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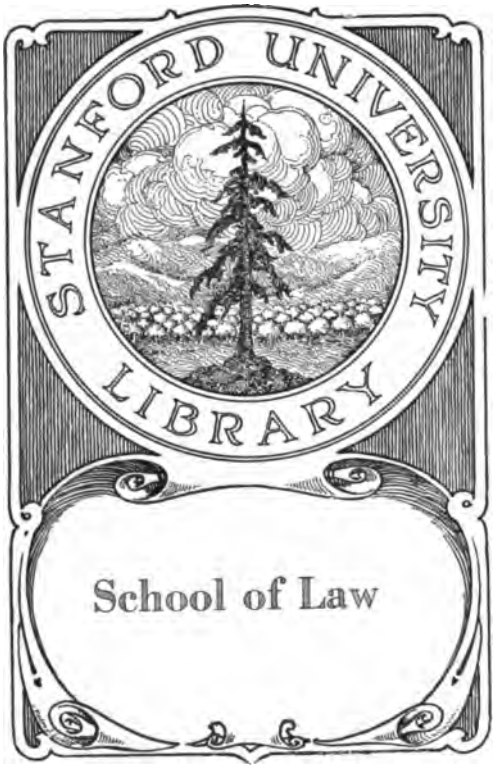
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ANNOUNCEMENT.

IT affords us much pleasure to announce to the members of the legal profession throughout Canada, as well as to all others who may be interested in obtaining early and accurate information concerning legal topics, that wholly new arrangements have been made for the publication and management of THE CANADA LAW JOURNAL. Beginning with this number, the LAW JOURNAL will be published by J. E. BRYANT & CO., already well and favourably known for their enterprise as publishers. Their name is a sufficient guarantee, not only of the excellence of the mechanical work which will, we trust, in future make this JOURNAL more attractive in form and more readable than heretofore, but also of the infusion into it of an amount of energy and enterprise sufficient to maintain it in the very front rank of periodicals of its class on this Continent. The present number is printed from new type, ordered specially for use in the printing of THE CANADA LAW JOURNAL. The paper is of a superior quality, and every effort will be made to maintain a high standard of excellence in paper and typography. The editorial staff has been increased, and special arrangements having been entered into to secure articles on topics of current interest by eminent members of the legal profession in Canada, with occasional contributions from Great Britain, all that is new and important in legal literature, books and periodicals—Canadian, English and American—will receive our most careful attention, and we shall seek to keep our readers fully informed in that wide field. Our columns will be open to correspondents for the discussion of legal questions of general interest; the space given to original and contributed articles will be greatly increased, and the notes of recent English, American and Canadian decisions will be fuller and more comprehensive than heretofore. Special pains will be taken to secure accurate reports of important decisions in the County Courts and Division Courts. Other additions and improvements have been suggested, which will be embodied in future numbers. To aid in the accomplishment of the end we have in view, we have decided to increase the size of each number, which will now contain 32 pages, instead of 20 as formerly. We hope that in its new form THE LAW JOURNAL will receive that hearty support and encouragement which it will be our constant aim to merit. The subscription is as formerly, $5.00 per annum, in advance. All communications relating to subscriptions, advertising, accounts, or arrears, should be addressed to the publishers. They desire us to state that they regret they have been unable to procure paper for the cover of this issue of the kind and quality which they purpose using in future; it had to be ordered specially, hence the delay.

The Dominion Loan and Investment Company v. *Kilroy*, 14 O. R. 468, may serve as an illustration of the present muddle in which the recent decisions have brought the law relating to married women's rights of property. In this case the husband failed in business, and then, under power of attorney from his wife, he applied to a firm and obtained a stock of goods on her credit and responsibility. She had no capital whatever at the time the goods were purchased. The husband carried on the business as his wife's agent, and it was held that the goods were the goods of the wife and not of the husband. But if the wife had been sued for the price of the goods she would have had, according to *Palliser* v. *Gurney*, 19 Q. B. D. 519, a good defence, because she had no separate property at the time the contract for the purchase of these goods was made! so that the creditors of both husband and wife would be effectually baulked.

AN old subscriber and correspondent takes exception to the advertisement of a legal firm in a country town wherein they are called "Barristers, etc.," the fact being that the only member of the firm who is entitled to that distinction is a Q. C., living in Toronto, his country partner being a solicitor only. This sort of thing is wrong and unprofessional, because in the first place it states what is not a fact, and secondly because it tends, whether intended or not, to deceive the public, and looks like an attempt to gain an improper advantage over other professional men in the same locality. If the young man who desires to be thought a barrister cannot make a living as a solicitor on his own merits, and without the thoughful assistance of the shadow of a Q. C. living a hundred miles or so distant, he had better turn his attention to some other calling. The Q. C. himself would do well to take the hint and consider the situation.

IN a recent case before the Divisional Court of *Watt* v. *Clark*, a judgment was set aside and a new trial ordered upon payment of all costs, on the ground that the judgment was entered by consent of counsel who had acted without authority. The action was for defamation, and at the trial, in the defendant's absence, his counsel agreed to a compromise whereby the action was practically withdrawn, the defendant paying all costs. On the settlement being communicated to the defendant he repudiated it, and subsequently moved the Divisional Court to set aside the judgment with the result above stated. This case is an instance of the way in which the same state of facts sometimes receives a diametrically different treatment by different Courts, for it appears that on the 28th November, just a few days before, the English Court of Appeal had refused to set aside a judgment obtained under just the same circumstances. That case is *Matthews* v. *Munster*, noted 84 L. T. 79, which was an action for malicious prosecution. In the course of the trial, in the absence of the defendant, his counsel agreed upon a compromise. Upon coming into court later he repudiated it, and subsequently moved the Divisional Court for a new trial. But the Divisional Court (Stephen and Wills, JJ.) refused the motion, and their decision was affirmed by the Court of Appeal, which court held that the client hands over to the advocate complete

control over the conduct of the cause in court, and that settling the action is part of the conduct of the cause, and that the defendant was consequently bound by the settlement.

IF there are many cases like the following, related by a gentleman in England familiar with the facts, one would cease to wonder at Socialism or any other form of lawlessness; rather would we be surprised at there not being more violent protests against wooden-headed and stony-hearted maladministration of a law somewhat questionable as to its wisdom. In England the law requires all children of a certain age to go to school, under penalties against parents in case of neglect. The incident and its result is thus reported :—

The case is that of a decent man, a labourer out of work, who for some time past has been endeavouring to earn a precarious living by cleaning boots at a stand opposite the People's Palace. He has a family of three children, the eldest being twelve, the second nine, and the youngest a little girl of four years. Not having the money to pay for their attendance at one of the East-end Board schools, he was summoned before the Thames Police Court; but on the day when the summons was returnable he had a prospect of work at Walthamstow, and did not in consequence appear. The case was dealt with in his absence, and sentence was pronounced of seven days' imprisonment. He was at twelve o'clock the same night dragged out of bed, and immediately conveyed to prison. He had, of course, to wear the prison dress during his incarceration; he was fed on bread and water, and the task of picking oakum was allotted to him. His only fault being that, not having money to purchase bread, he had, of course, none to pay for school fees, which the Board would not remit. If that which the poor in London are compelled to suffer were endured by persons in a different rank of life, or if the element of party politics could be infused into the cases, the whole world would wonder at the harshness and barbarism with which the provisions of the law are carried out.

POWER OF LOCAL LEGISLATURES TO IMPOSE TAXES.

BY the British North America Act, s. 92, ss. 2, the Local Legislatures of the various Provinces comprising the Dominion of Canada are empowered to make laws for "direct taxation within the Province, in order to the raising of a revenue for Provincial purposes." This power is, however, not altogether absolute, but is to some extent restricted by the fact that in the Dominion Parliament is vested certain other exclusive rights, in consequence of which it has been held that the Provincial Legislatures cannot properly exercise the powers given them under s. 92 in a way that will infringe on the exclusive powers of the Dominion Parliament. Thus in *Severn* v. *The Queen*, 2 S. C. R. 70, the Supreme Court held that a licence tax imposed on dealers in liquors under the authority of an Act of the Legislature of Ontario was invalid, because the act conflicted with the powers conferred on the Dominion Parliament for the regulation of trade and commerce. But it is not in this respect alone that difficulties arise in the exercise of the powers of Local Legislatures to impose taxes. One of the principal obstacles is the determination of what does, and what does not, fall under the term "direct taxation."

According to John Stuart Mill—"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended, or desired, should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another: such are the excise or customs." Mill also lays down the proposition that to be strictly a direct tax, it must also be general.

Political economists, however, are not altogether agreed on this definition of "direct" and "indirect" taxation, and it is obvious that these definitions, though useful for the purpose of discussions on the subject of political economy, are too often based on principles which can hardly be safely or wisely adopted in the construction of Acts of Parliament.

Prima facie all taxes payable by individuals, or corporations, are direct taxes, and it is only an artificial distinction to assign to some taxes the character of direct, and to others the character of indirect taxes. The attempt to determine whether a tax imposed by a Local Legislature is, or is not, a direct tax, by a consideration of the question whether or not the primary payer is actually able to shift the burden of its payment on some other person, though apparently undertaken by the Privy Council in *The Attorney General of Quebec* v. *Reid*, 10 App. Cas. 141, seems virtually to have been abandoned by their Lordships in the more recent case of *Bank of Toronto* v. *Lambe*, 57 L. T. N. s. 377. In *Attorney-General* v. *Reid*, the tax which was contested was a fee of 10c. imposed on exhibits in legal proceedings. This was held to be invalid because it was held to be an indirect tax, and Lord Selborne, C., who delivered the judgment, arrived at that conclusion on the ground that the ultimate incidence of the tax could not be ascertained, that it depended on the result of the proceedings by whom it would be ultimately borne, and that the Legislature in imposing the tax could not have had in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden. Therefore he said it could not be a tax demanded "from the very person who it is intended or desired should pay it," for, in truth, that is a matter of absolute "indifference to the intention of the Legislature." And it might be well doubted whether any tax whatever could be said to be a direct tax, if that question were to depend on the intention of the Legislature as to the person by whom it should be finally borne.

The absurdity of construing the B. N. A. Act upon any such principle as that seems to have been felt by their Lordships themselves in the later case of *Bank of Toronto* v. *Lambe*, for Lord Hobhouse justly remarks that the "Legislature (by which he means the Imperial Parliament) cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to, and ascertainable by, the general tendencies of the tax and the common understanding of men as to those tendencies." In the latter case, too, their Lordships were emphatically clear that the question of whether a tax is direct or indirect, could not as a matter of law be affected by the fact of its not being general.

In *The Attorney-General of Quebec* v. *The Queen Insurance Co.*, 3 App. Cas. 1090, a stamp duty imposed on policies and renewal receipts issued by insurance companies, varying with the amount of the premium, was held to be an indirect tax. The Act purported to impose the tax in question as a licence, but the Privy Council held that in substance it amounted simply to an Act imposing a stamp duty, and stamp duties were held to come under the head of indirect taxation. On the same principle a stamp duty on exhibits in legal proceedings was held invalid (*Attorney-General of Quebec* v. *Reid*, 10 App. Cas. 141, already referred to.) In *Bank of Toronto* v. *Lambe*, 57 L. T. N. s. 377, the tax in question was one imposed on Banks and Insurance Companies doing business in the Province of Quebec, varying with the amount of paid-up capital, and an additional sum for each office or place of business. This was held to be a direct tax, for the reasons that it was demanded directly from the persons intended to pay it; that it was not a tax on any commodity the banks and insurance companies dealt in, and could sell at an enhanced price to their customers, and it was not a tax on their profits, nor on their several transactions, but was a direct lump sum assessed by simple reference to the amount of paid-up capital and the number of places of business; and, though it might happen that the banks or insurance companies might find some way of recouping themselves out of their customers, yet the process of doing so would be necessarily circuitous, and the amount of recoupment could not bear any direct relation to the amount of the tax paid. Moreover, their Lordships held that the Act in question was no interference with the regulation of trade and commerce, and therefore no infringement of the powers of the Dominion Parliament. And although it was admitted by the Privy Council that the powers given to the Local Legislatures by s. 92, ss. 2, were literally in conflict with s. 91, ss. 3, which empowers the Dominion Parliament to make laws for "The raising of money by any mode or system of taxation," yet their Lordships re-affirmed the opinion expressed in *The Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, that the general powers given by s. 91, ss. 3, could not be held to override the specific power conferred by s. 92, ss. 2, but on the contrary, as regards direct taxation within the Province to raise revenue for provincial purposes, that is a subject which falls wholly (and we presume by this is meant "exclusively") within the jurisdiction of the Local Legislatures.

This is a subject which, as time goes on, will likely become of importance here. So far, we have in this Province been free from the necessity of resorting to direct taxation, but with the large expenditure for Parliament Buildings and the necessarily diminishing revenue to be derived from our Crown Lands, the day is probably not very far distant when the Dominion subsidy will have to be supplemented by a resort to the powers to impose direct taxes.

THE LAW OF DIVORCE.

Several volumes of the Statutes which have been issued since Confederation, under the authority of the Parliament of Canada, contain private Acts passed "for the relief" of some burdened wife who has had a bad husband, or of some injured husband who has had an abandoned wife. In the session of 1887 bills were passed for dissolving the marriages of no less than five couples. These marriages are thereby declared to be thenceforth "null and void to all intents and purposes whatsoever." Since Confederation twenty-two divorces have been granted by Parliament. Sixteen of these were Ontario cases; the other six were from the Province of Quebec. Five applications are already in for the next session.

In the case of Susan Ash, peculiar features presented themselves, which we shall notice further on. She was declared competent to contract matrimony again, *i.e.*, to marry any other man whom she might have lawfully married if the dissolved marriage had not been solemnized. A similar enactment was made in regard to each of the other women whose marriages were dissolved. In the event of their marrying thereafter, they and the men whom they so respectively marry, and the issue, if any, of such marriages, are to have and possess the same rights as if the first marriages, now dissolved, had never been solemnized. In the case of each of the men whose marriages are dissolved, the first marriage is annulled, and he is declared to be at liberty to marry any other woman whom he might have lawfully married if the first marriage had not taken place. There is no provision that, in the event of any of these men marrying again, he and the wife that he so marries, and the issue, if any, of such subsequent marriage, shall have and possess the same rights as if the dissolved marriage had never been solemnized.

We do not quite understand why this distinction was made between women and men: husbands, and the issue of all their marriages, generally speaking, have marital, heritable, parental and filial rights, growing out of their respective relations, similar to those of wives and their children. We can, therefore, see no reason why all the clauses were not inserted in each of these five Acts, and made applicable for the relief of all alike.

The proceedings, in order to procure a divorce in the Provinces of Ontario and Quebec, are taken before the Federal Legislature, and are, in the absence of comprehensive rules of procedure, necessarily uncertain, cumbersome, tedious, dilatory and expensive. Some members of the Senate act with the strictest technicality, while others do exactly the reverse. Conducted before a Committee of the Senate, the members of which may or may not be professional men acquainted with the forms, modes, and ordinary safeguards of procedure, divorce measures are more or less uncertain in their results. In all such proceedings an uncertain amount of laxity, or an uncertain amount of technicality, is sure to be indulged in. Indifference to the seriousness of the problem is thereby manifested.

We feel it our duty to take this matter up, and raise our voice in warning

against the present mode of conducting such investigations. They deeply affect the morals and the best interests of that class of persons who are wealthy enough to seek for and obtain relief in circumstances which justify divorce. We need not say that, by the existing mode of proceeding in Parliament, those who are too poor to seek and pay for the ever-so-much needed relief must put up with their wrongs and bury their sorrows in some other way. This ensues simply because the Parliament of Canada has not deemed it wise to give them a relief which ought to be within their reach. They nominally possess the right to have the marital ties which bind them sundered for sufficiently grave reasons; but it is too expensive for any man of even moderate means—much more so for a woman without means—to seek to enforce that right. This thought is well expressed in an article in the *St. Thomas Daily Times*, as follows:—"Divorce is allowed to the rich and denied to the poor, and because one man has money in his purse to meet the necessary contingencies of employing counsel and of applying for an Act of Parliament by which alone, in those Provinces, divorce can be procured, he may obtain it by paying for it, whilst any other person may not do so. This state of the law is promotive of, and a direct incentive to, polygamy and immorality. A poor man in the year 1845 was convicted before the late Justice Maule of bigamy, and the absurdity of the then existing law was grimly brought out in the Judge's satire. The prisoner's wife had robbed him and ran away with another man. In passing sentence the Judge told him, 'You should have brought an action and obtained (?) damages, which the other side would not have been able to pay; and you would have had to pay your own costs, perhaps £100 or £150. You should then have gone to the ecclesiastical courts and obtained a divorce *a mensa et thoro*, and then to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been enabled to be married again. The expense might amount to five or six hundred or perhaps a thousand pounds. You say you are a poor man, but I must tell you that there is not one law for the rich and another for the poor.' The trouble with the law, as it is administered by Parliament, is that although there be only one law for the rich and the poor, the remedy is placed so far above the means of the poor that they are like sheep stalled with the taller animals: they cannot reach the fodder upon which the bullocks are fed from high racks." Surely that is a one-sided, irremedial, incomplete and poorly administered law which cannot be invoked by every wronged one, man or woman, rich or poor.

Many persons have gone from Canada to the United States to take proceedings in a divorce court against a husband or a wife who lived in the Dominion, and who had never set foot on the soil of the United States or out of Canada. In one instance within the knowledge of the writer, a Canadian woman (once supposed to be a lady), whilst still living with her husband, betook herself to a Detroit divorce lawyer, a well-known affidavit broker and specialist. She retained him to procure a judicial separation *a mensa et thoro*, on account of incompatibility of temper. The papers were served on the husband just when she thought it about time to quit his house; and he, not caring enough about that kind of a wife to fee a lawyer, and looking upon it as rather amusing than otherwise, let

the matter go by default. In due time a decree was taken out and served upon him. Divorced after that form and fashion, they thereafter separated, and each mated with a more congenial, but equally easy-going, companion.

In the case of Susan Ash, already mentioned, a few more votes would have established the doctrine that these decrees of United States and other foreign courts, purporting to divorce British subjects married and residing in Canada, were binding upon our tribunals, and in every way valid. The temper of the Committee before which this case came, and the tenor of its discussions, were such that but a few more votes would have disposed of it in such a way as to go to the very tap-root of all morality and establish a doctrine most dangerous to our social well-being. The effect of such a decision would have been that, as in the case of the woman mentioned before, people dissatisfied with their spouses might pop over the lines, be divorced, and come back ready to marry (?) again.

We again quote from the article already referred to:—"We admit that this question is surrounded by difficulties, as a social question generally is; and, as a religious question, we find that all Parliamentary and judicial separations granted by civil tribunals are opposed by one denomination of Christians, whose members in the Legislature invariably vote against every divorce bill; but when in point of fact bills of this character pass almost every session of the Legislature, as the statute books show they do, we do not see why one set of persons should be denied or debarred from the remedy or relief of a social wrong any more than should another set. It has resolved itself into a sort of class legislation, as we view it from its results. If the Roman Catholic Church will not sanction divorces granted by a civil tribunal, or by that highest court, the Parliament of the land, it surely has a right to confine its voice to, or exercise its veto upon, Roman Catholic marriages, or marriages celebrated by Roman Catholic clergymen. We suggest, too, that if the Senate of Canada is to continue exercising the functions of a court of divorce for people who are suffering from social grievances and that form of family affliction for which divorces should be granted, the wronged ones, if necessity requires it, should have the power of petitioning Parliament *in forma pauperis*, or of showing that they have not the means of prosecuting or proving the case in the ordinary way, and praying that the evidence may be taken before a judge in the place or places where the facts are known or where the parties reside, under commission, to be returned to the Senate, and that the return of the facts made by the Judge should be taken and read in all respects the same as if they had been proven before the Parliament itself."

We insist, however, that, as these measures of relief cause inevitable divisions, and always result in votes adverse to the religious principles and scruples of the minority, it would be far better that all proceedings in divorce should cease at once and forever, or that the law of divorce should be settled and dealt with definitively. To that end a well-considered and final procedure should be adopted. The existing courts, which possess the power to settle rights of property and to determine questions of alimony, legitimacy and lunacy, as well as the care and guardianship of minors and infants, must be as competent to deal with and administer the law of divorce as any casual committee of

the Senate can possibly be, and, indeed, much more competent. It is well known that, in a body constituted as the Senate is, a certain amount of inertia must be expected; and as the sacredness of the marriage tie so deeply affects the moral, religious and social well-being of families and the peace of the home, as well as the best interests of the community, we trust that licensed polygamy may never obtain a foothold on our fair soil, as it has in some of the States of the neighbouring Republic.

We trust also, that if the Government will not now take up the problem, and deal with it in a statesmanlike manner, some private and independent member will bring in a measure to improve the present law. If there be a law at all, it should be administered in a judicial spirit. As we have insisted, the law, such as it is, as now administered, is found to be deficient, and any case which may be presented for the purpose of procuring a divorce, is neither hopeful nor hopeless. A committee is appointed on motion of a member who desires to promote the Bill. In this, as in most other cases, a strong man can have things to suit his own mind, and a rough and ready mode of dealing with the matter is pursued. This disturbs the sensibilities of those who duly appreciate the importance of the decision to be reached, whilst men who have no sensibilities are inert and apathetic.

In most of the States of the American Union a sort of licensed polygamy exists under the forms and sanction of law, and this evil our legislators in Canada may possibly take pattern from, in course of time, unless safeguards are established. These safeguards may be somewhat difficult to devise; but surely they are attainable by wise and moderate legislation, in the same way as other moral, social, and legal reforms. We may not secure all that we wish, but we obtain nothing by inaction, or by stupid conservation of haphazard, imperfect and unsatisfactory procedure. We have no hesitation in saying that, in some form, a Divorce Court should be established, or existing courts should have this jurisdiction conferred on them. This must not be for the purpose of facilitating divorce, or enlarging or extending the causes for which divorces should be granted. We hold to the scriptural rule, whatever others may hold. We trust that others will discuss this suggestion as we have endeavoured to do, upon the grounds of expediency and merit. The present mode of hearing and disposing of divorce measures is inexact and unsatisfactory, and we desire to direct attention to the absolute need which exists for rules of procedure, so that everything may be duly planned and settled in such a way as to avoid hasty, improvident, or prejudiced action.

In conclusion we may, we trust, be allowed to observe that, in the Divorce Bills of the past, no provision was made for permitting the delinquents to marry again. It has been strongly argued that, in the interests of morality, they should be allowed to do so upon the dissolution of the marriage tie.

The few discussions which have taken place on the subject of divorce in the different Church courts have not been followed by very definite action. No other Church has expressed so definite an opinion as has the Reformed Episcopal Church, which, at the meeting of its General Council, held at Philadelphia last

June, came out boldly with no uncertain sound, and, so far as one denomination could do so, spoke to all and sundry by passing the resolutions which we give below. They are the standing canons of that communion, and may be suitably read in this connection:—1. That the Reformed Episcopal Church recognizes adultery as the only scriptural ground for divorce. 2. That this Church forbids its ministers to perform the marriage ceremony for any divorced party, unless the person from whom that party is divorced has been guilty of, or is living in, adultery. 3. That nothing in these resolutions forbids the re-marriage of former husband and wife.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The first instalment of the *Law Reports* for December comprise 19 Q. B. D. pp. 565-683; 12 P. D. pp. 193-207; 36 Chy. D. pp. 261-700; and 12 App. Cas. pp. 471-651. Owing to the large number of cases included in these numbers our notes of them must be necessarily very brief.

COMPANY—DEBENTURES—MORTGAGE OF COMPANY'S ASSETS—BILL OF SALE—REGISTRATION—EXECUTION CREDITOR.

Commencing with the cases in the Queen's Bench Division *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568, is to be noted. In this case debentures were issued by a limited company in the form of bonds whereby the Company covenanted to pay the bearer the principal and interest, and each bond contained a clause stating that its payment was secured by an indenture of mortgage made in favour of certain trustees. The mortgage deed was not identified in the debentures by its date or by any further particulars of its contents; and the debentures themselves did not purport to pass any property of the Company to the holder. The mortgage deed itself which bore even date with the debentures was an ordinary mortgage deed purporting to convey all the land, plant, fixtures, etc., of the Company to the mortgagees; it contained no trust for the benefit of the debenture holders. It was not registered as a bill of sale. Goods and chattels of the Company having been seized under execution, a claim was made to them by a debenture holder, and it was held by Grave and Huddleston, JJ., that the mortgage was void for want of registration under the Bills of Sales Act, and that the debentures created no charge enforceable by the claimant against a *bona fide* execution creditor.

NEGLIGENCE—EMPLOYERS' LIABILITY ACT, 1880, s. 1, ss. 2 (49 VICT. C. 28, s. 3, ss. 2–3, O.)—NEGLIGENCE OF FELLOW-WORKMAN.

Kellard v. *Brooke*, 19 Q. B. D. 585, is an action under the Employers' Liability Act, from which our Provincial Statute, 49 Vict. c. 28, is adapted. The plaintiff and other workmen were employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. The bales were hauled to the hatchway and dropped down to the workmen below. B., who worked on deck, giving a signal

to the men below before the bales were dropped. The plaintiff was injured by a bale coming down, according to his statement, without any warning. Hawkins and A. L. Smith, JJ., held that the plaintiff was not entitled to recover because there was no evidence that the injury was caused by the negligence of a person who had any "superintendence" intrusted to him whilst in the exercise of such superintendence, or by reason of negligence of any person in the service of the defendant, to whose orders or directions the plaintiff was bound to conform.

NEGLIGENCE—EMPLOYERS' LIABILITY ACT, 1880 (49 VICT. C. 28, O.)—VICIOUS HORSE—RISK VOLUNTARILY INCURRED—"WORKMAN," "PLANT," DEFECT IN CONDITION OF.

The only other case we think it necessary to refer to in the Queen's Bench Division is *Yarmouth* v. *France*, 19 Q. B. D. 647, another case under the Employers' Liability Act, 1880, in which the much canvassed case of *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, again came under consideration. The plaintiff was in the employment of the defendant, who was a wharfinger, owning carts and horses for the purpose of his business. It was the duty of the plaintiff to drive the carts, and load and unload goods carried by them. Among the horses was one of a vicious nature, and unfit to be driven even by a careful driver, which the plaintiff objected to drive, and which he told the foreman of the stable was unfit to be driven, to which the foreman replied that he must go on driving it, and if any accident happened his employers would be responsible. The plaintiff continued to drive the horse, and, while sitting on the proper place in the cart, was kicked by the animal and his leg broken, on account of which injury the action was brought. It was held by Lord Esher, M. R., Lindley and Lopes, L.JJ., sitting as a Divisional Court, that the plaintiff was a "workman" within the definition in s. 8 of the Act; but here the agreement of the Court ended.

Lord Esher, M. R., and Lindley, L. J., held that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant; on this point Lopes L. J., expressed no opinion. Lord Esher, M. R., and Lindley, L. J., were also of opinion that upon the facts the jury might find the defendant liable, because there was evidence of negligence on the part of the foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff. But Lopes, L. J., on the other hand, thought that there was no case to go to the jury, because he was of opinion that the evidence showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment.

The view of the majority of the court on this point may perhaps be best summed up in the following passage in the judgment of Lindley, L. J.:

"If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held as a

matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it, nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because, though he protested, he went on as before."

None of the cases in the Probate Division appear to require notice here.

SALE OF GOODS INDUCED BY FRAUD—RESTITUTION OF GOODS ON CONVICTION—SALE IN MARKET OVERT.

Turning now to the appeal cases, the first we find requiring notice here is *Bentley* v. *Vilmont*, 12 App. Cas. 471, in which the House of Lords affirms the case reported *sub nom*, *Vilmont* v. *Bentley*, 18 Q. B. D. 322, noted *ante*, vol. 23, p. 142. This was a civil action brought by a person who had been induced by fraud to sell his goods, to recover them from a third person who had bought them in market overt before conviction of the fraudulent purchasers, and without notice of the fraud—no order for restitution had been made. The Court of Appeal overruling *Moyce* v. *Newington*, 4 Q. B. D. 32, held the plaintiff entitled to recover, and this decision was affirmed by the Lords, though in pronouncing the judgment their Lordships said they had come to the conclusion with very great reluctance. As Lord Watson points out, there is a material distinction between the case of stolen goods, and goods obtained by fraudulent practices. In the former case the original owner and the purchaser in market overt are in *pari casu*, and neither has done aught to mislead the other; whilst in the latter case, the original owner has intentionally given his fraudulent vendee an *ex facie* absolute and valid title to the goods upon which purchasers, without notice of the fraud, are entitled to rely. But their Lordships held that the statute allowing restitution had made no distinction between the two cases, and therefore in both cases the right to the goods remained in the original owner.

MARINE INSURANCE—CONCEALMENT OF MATERIAL FACTS—PRINCIPAL AND AGENT—CONCEALMENT BY AGENT, THROUGH WHOM POLICY NOT EFFECTED.

It must be confessed that the Court of Appeal, when it differs from its Chief, has been unfortunate in the result of the appeals from its decisions reported in this number. In the important case of *Blackburn* v. *Vigors*, 12 App. Cas. 531, their decision in 17 Q. B. D. 553, noted *ante*, vol. 22, p. 377, which came with something like a shock upon the profession, has been reversed in the Lords. It will be remembered that in this case the plaintiffs instructed a broker to insure an overdue ship. Whilst acting for the plaintiff this broker received information which cast grave doubts on the safety of the ship. Without communicating this information to the plaintiff, he recommended him to apply to another broker, which the plaintiff did, and effected an insurance through this other broker, "lost, or not lost," on which the action was brought. The ship had in fact been lost some days before the insurance was effected; but neither the plaintiff nor the broker through whom the insurance was effected knew it, and they acted in good faith. The Lords held that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover.

SHIP—BILL OF LADING—PERILS OF THE SEA—COLLISION.

In *Wilson* v. *Owners of Cargo* per "Xantho," 12 App. Cas. 503, the House of Lords reversed the decision of the Probate Division in "The Xantho," 11 P. D. 170, noted *ante*, vol. 23, p. 26. The action was brought against ship owners for non-delivery of goods pursuant to a bill of lading, which contained the usual exceptions of "dangers and accidents of the sea." The non-delivery was due to the fact that without fault of the carrying ship it had come into collision with another vessel and foundered. The Probate Division held that this was not *prima facie* a loss within the exception, but the Lords were of a different opinion, and overruled *Woodley* v. *Michell*, 11 Q. B. D. 47, which the court below had followed.

BILL OF LADING—PERILS OF THE SEA—DAMAGE CAUSED BY RATS.

In *Hamilton* v. *Pandorf*, 12 App. Cas. 518, their Lordships also overruled the Court of Appeal, whose decision *sub nom. Pandorf* v. *Hamilton*, 17 Q. B. D, 670, was noted *ante*, vol. 22, p. 396. In this case rice was shipped under a charter party and bills of lading, which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea water escaped and damaged the rice without neglect or default of the ship owners or their servants. The court below held that this was not a damage within the exception, but their lordships reversed this decision and restored the judgment of Lopes, L. J., 16 Q. B. D. 629.

B. N. A. ACT, 1867, s. 91, ss. 2, 3, 15; s. 92, ss. 2—DIRECT TAXATION—POWERS OF LOCAL LEGISLATURES.

In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, the Judicial Committee of the Privy Council held, that under the B. N. A. Act, the Local Legislature of Quebec had power to impose a tax upon banks and other corporations doing business in the Province of Quebec, varying in amount with their paid-up capital and number of offices, and that such a tax was "direct taxation."

MUNICIPAL CORPORATION—46 VICT. C. 24 S. 4 (D.)—EFFECT OF ORDER OF RAILWAY COMMITTEE—RIGHT OF RAILWAY CO. TO COMMENCE OPERATIONS—TRESPASS—PRINCIPAL AND AGENT.

The only remaining case we think it necessary to notice is *Parkdale* v. *West*, 12 App. Cas. 602, another appeal from the Supreme Court of Canada. This was an action brought by property holders against the corporation of Parkdale, to recover damages for trespass to their property, by the construction of a subway. The work was authorized to be done by railway companies by an order of the Railway Committee, under 46 Vict. c. 24 s. 4 (D.), but it was actually performed by the corporation as agents as they claimed for the railway companies, but it was held by the Privy Council that the order of the railway committee did not of itself, apart from the provisions of law thereby made applicable to the case of land required for the carrying out of the work, empower the railway companies to take any person's land or interfere with any person's rights except in the way pointed out by law, and that as the provisions of the Consolidated

Railway Act, 1879, as to the deposit of plans and book of reference relating to the proposed work had not been complied with, neither the railway companies, nor the corporation as their agents, had any right to commence operations. And it was also held that the payment of compensation to persons whose lands were required to be taken, or injuriously affected by the proposed works, was also a condition precedent to the right of the railway companies to take, or interfere with such lands.

Reviews and Notices of Books.

A Treatise on the Investigation of Titles to Real Estate in Ontario, with a Precedent for an Abstract. By EDWARD DOUGLAS ARMOUR, of Osgoode Hall, Barrister-at-law. Toronto: Carswell & Co., Law Publishers. 1887.

This book deals with a subject of general importance to the profession, and the position of the author, as one of the lecturers of the Law Society, led us to hope that the work would be found to be distinguished by thoroughness and exactitude, and for this reason we have made a careful examination of it to see how far our expectations are verified. While there is much to commend, we cannot help feeling that this work falls somewhat short of our, perhaps too sanguine, expectations.

The arrangement of the matter is on the whole judicious and the style generally clear, and the printer and proof-reader have certainly done their parts admirably, and the comparative absence of typographical blunders is quite remarkable in a Canadian law book.

In many respects the author has acquitted himself unusually well, considering that this is his first effort at book-making. His work is decidedly less sketchy than Chief Justice Taylor's little book on the same subject, on which to some extent it is founded. At the same time, we do not think it is justly entitled to unqualified praise. Mr. Taylor's book, though little more than a mere skeleton, was, nevertheless, as far as it went, strictly accurate and reliable, while Mr. Armour's, like most first editions, is by no means free from certain inaccuracies necessary to be noticed. Some matters which one would naturally expect to find in a work of this kind are not referred to. The author has entirely omitted the subject of tax titles, but his reason for so doing does not appear to us sufficient. The existence of American treatises, which omit all reference to the large number of Canadian cases upon that important subject, does not, by any means, supply the want. While the author gives his reasons for not including tax titles, he gives no reason for omitting all reference to estates tail, estoppel, restrictive covenants, and covenants running with the land, and the procedure under the Vendors and Purchasers Act for resolving questions of title, all of which matters, we should have thought, would naturally form an important part of a work of this kind.

We do not think we are too exacting in expecting that all the Canadian cases of importance bearing on the subject should be collected and collated, but in this respect, too, the work fails to come up to our expectations. This may be seen, when we say that no reference is to be found to such cases as *Van Wagner* v. *Findlay*, 14 Gr. 53; *Tylee* v. *Deal*, 19 Gr. 601; *Beattie* v. *Mutton*, 14 Gr. 686; *Dilk* v. *Douglas*, 26 Gr. 99, 5 A. R. 63; *Green* v. *Ponton*, 8 O. R. 471; *Muir* v. *Dunnet*, 11 Gr. 85; *Reg.* v. *Guthrie*, 41 Q. B. 148; *Mulholland* v. *Harman*, 6 O. R. 546; *Beaty* v. *Shaw*, 13 O. R. 21; *Scott* v. *Scott*, *Ib.* 551; *Smith* v. *Smith*, 5 O. R. 690; *Coleman* v. *Hill*, 10 O. R. 172; *McKay* v. *McKay*, 31 C. P. 1; *Imperial Bank* v. *Metcalfe*, 11 O. R. 467; *Laird* v. *Paton*, 7 O. R. 137; Re *Shaver*, 3 Chy. Ch. R. 379, and scores of other cases which might be named, bearing on the subject treated of.

While, however, the author has omitted many cases which we hope to see in a new edition, he has, in some instances, been unnecessarily laborious over minute points. For instance, ten pages, or nearly one twenty-eighth of the work, is devoted to the discussion of the question as to the precise moment when a document can be said to be legally registered, and three pages are devoted to an elaborate argument as to the right to search the Abstract Index; and a very ample discussion on the subject of curtesy is subsequently repeated to a great extent, when discussing the power of a married woman to convey her estate. We can not help thinking it would have made the book more useful to have shortened these passages and amplified others which are treated less fully.

The author is, for the most part reliable, but we think in some few instances he has fallen into error, and that the work, therefore, needs revision, and will in the meantime require to be used with caution. For instance, when he tells us, at page 131, that an equity of redemption, which is not saleable under *fieri facias*, may be safely purchased from the owner without searching for executions against him, we think he is altogether wrong. We are inclined to think it would be found that the existence of a writ in the sheriff's hands against the owner of the equity of redemption would, in equity, bind his interest, even though it might not be saleable under the writ, but might require the aid of what is called "Equitable execution," to make it available. See *Moore* v. *Clark*, 11 Gr. 497. We think the author is also wrong in stating that equitable execution can be obtained without issuing a writ. The practice settled by *Shea* v. *Denison*, 14 Gr. 513, also see *Wilson* v. *Proudfoot*, 15 Gr. 103, we think, is still obligatory. The only authority in our courts for the proposition stated by the author, that we are aware of, is *Johnston* v. *Bennett*, 9 P. R. 337, an unconsidered and *ex parte* judgment of Proudfoot, J., purporting to follow *Kerr* v. *Styles*, 26 Gr. 309, a case in which execution had been issued. So also it will be found that the cases of *Crookshank* v. *Humberston*, 6 O. S. 103, and *Ley* v. *Peter*, 3 H. & N. 101, do not bear out the propositions for which they are cited. In his citation of the latter case Mr. Armour, however, follows the blunder of English writers.

On page 153, we are told that if a married woman "dies intestate" her hus-

band will be entitled to her estate by the curtesy, unless her legal personal representative succeeds to her real property under 47 Vict. c. 19, s. 19. Further on, however, at page 156, we learn that since the passing of the Devolution of Estates Act, 1886, the real estate of a married woman upon her death devolves upon her personal representative, and the true position of the husband as to curtesy is stated.

On page 72, the statement as to the effect of possession under an unregistered instrument needs qualification, as will be seen by the case of *Latch* v. *Bright*, previously cited on page 57.

When the author tells us on page 99 that "trust estates descend to the eldest son," he has evidently forgotten to make the necessary changes which the "irritating" amendment, effected by the Devolution of Estates Act, 1886, rendered necessary in his text.

On page 167, it is said that when land is mortgaged after the commencement of work, for which a mechanic's lien may be claimed, the mortgage takes priority over the lien. We can only say that we would strongly advise no one to act on that view of the law. Even if the authorities referred to are sound, the bold statement in the text needs very considerable qualification.

On page 170, it is said that under our system of registration, the production of deeds is not a matter of much moment. To this we are not able to assent; on the contrary, a case occurs to us where a gross swindle was defeated by the simple fact that the solicitor concerned in the transaction insisted on the production of the original deeds.

On page 183, a trap is laid for the unwary by the suggestion that third parties may properly be served with a petition under the Vendors and Purchasers Act, a proceeding which, we may observe, has already been tried in practice with the sole result of saddling the petitioners with the costs of such parties: *Lewis & Thorne*, 14 O. R. 133.

In treating of titles by possession, we should have been glad to see more than a passing reference to the effect of payment of rent or interest, and it would have been well had the author collected the recent cases relating thereto.

On pages 215 and 223 it is said that letters of administration are no better evidence of intestacy now than they were before the Devolution of Estates Act, 1886. This, we think, is a mistake. We need hardly point out that formerly letters of administration were really only proof of intestacy as to personalty, and were consistent with the fact of the deceased having left a will as to his realty. Now, when letters of administration are granted, both as to real and personal estate, such letters will be just as good evidence of intestacy as to realty as they are in regard to personalty, because they cannot be granted except upon due proof that there is no will affecting either real or personal estate.

On page 224, the author states that a will thirty years old proves itself on production, and that the thirty years are to be computed from its date, and not from the death of the testator. We do not see why the authority in our court on this subject, *Iler* v. *Elliott*, 32 Q. B. 440, is not cited, and it would surely be useful to note that the point is not altogether free from doubt on principle, for

the testator might live more than thirty years after the date of his will. We think the author should also have cautioned his readers against relying on a mere registered copy of a will with no proof of the death of the testator, as it is possible to register a will in the lifetime of the testator, and such a case has actually occurred in practice.

While there is much patient industry manifested in the book, there are some few places where the author appears to have been napping. Thus, on page 57, an observation of Richards, C.J., is quoted as a part of a judgment of Draper, C.J., and the sentence given, though perfectly intelligible when taken with its context, when isolated, as it is by the author, serves to raise a doubt in the mind of the reader whether it supports or conflicts with the proposition in reference to which it is cited. Then *Boynton* v. *Collins*, and *Thompson* v. *Curzon*, are cited at page 251, but the reader is not informed that these decisions were subsequently overruled by *Reid* v. *Reid*, 31 Ch. D. 402. So also *Faulds* v. *Harper*, 2 Ont. R. 405, is cited on page 129, but the reader does not learn from the book before us that that case subsequently went to the Court of Appeal, and ultimately to the Supreme Court (see 9 App. R. 537 and Cass. Dig. 229.)

It is a great pity the author did not see his way to withholding the book from publication until the revision of the Statutes was completed, as it will unavoidably lose much of its value as a work of reference now that the revision has taken effect.

Notwithstanding the blemishes we have pointed out, we think this work is likely to prove a valuable addition to our legal literature; and though we have been at some pains to point out some of its defects, we hope that the author may soon be called on for a second edition, when he will no doubt see his way to removing them.

The Text-Book Series. Published monthly by the Blackstone Publishing Company, Philadelphia. 1887.

The last of the Law Text-Book Series, published by the Blackstone Publishing Co., of Philadelphia, for the year 1887, is *May on Fraudulent Conveyances.* This series contains a collection of the freshest, most authoritative and valuable text-books in the leading departments of law. The work mentioned above is a treatise on the Statutes of Elizabeth against fraudulent conveyances. It is reprinted from the second English edition, published in 1887, the first edition having been issued in 1871. It is the standard authority on the subject of which it treats, and it also discusses the Bills of Sales Act (Eng.) of 1878 and 1882, and the laws affecting the voluntary disposition of property. Additional value is given to this edition, in that reference has been made to some of our Ontario cases, as well as to some American decisions. The series for 1888 will contain an unusual number of exceptionally valuable works.

Proceedings of Law Societies.

THE LAW SOCIETY OF UPPER CANADA.

PROCEEDINGS OF CONVOCATION—MICHAELMAS TERM, 1887.

THE following is a *resumé* of the proceedings of Convocation during Michaelmas Term, 1887:—

The following gentlemen were called to the Bar during the above Term, *viz.*:—

November 21st—George Watson Holmes, Herbert Langell Dunn, Roderick James Maclennan, James Albert Page, Francis Foley Lemieux, Edward Holton Britton, Alexander Robert Bartlet, Robert James Leslie, Herbert Hartley Dewart, Robert Cleugh Le Vésconte, D'Arcy de Lessert Grierson, William John Millican, George Filmore Cane, Horace Osmond Ernest Pratt, Richard Alexander Bayley.

November 22nd—Abner James Arnold, William Percy Torrance.

November 26th—William Arthur John Bell.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz.*:—

November 21st—E. H. Britton, R. C. Le Vésconte, R. J. Maclennan, G. F. Cane, R. A. Bayly, G. R. O'Rielly, E. S. Wigle, E. A. Crease, A. F. May, G. J. Leggatt, R. H. Dignan, J. H. A. Beattie, E. Considine, A. D. McLaren, H. N. Roberts, H. Macbeth.

November 22nd—A. Stevenson.

November 26th—J. C. Grant, A. R. Bartlet, R. J. Leslie, G. W. Holmes, W. D. Gregory, W. A. J. Bell, G. A. Payne, J. P. Lawless, J. Y. Murdoch.

December 2nd—W. P. Torrance, J. M. Quinn.

December 10th—C. E. Weeks.

The following gentlemen passed the First Intermediate Examination, *viz.*:—

J. F. Orde, with honours and first scholarship; C. E. Burkholder, with honours and second scholarship; W. H. Hunter, with honours and third scholarship; A. Constantineau, with honours; and Messrs. J. Ross, D. Hooey, R. A. Widdowson, E. S. B. Cronyn, J. Webster, A. C. Sutton, M. Routhier, W. L. Morton, T. W. Horn, A. J. J. Thibodo, H. A. Simpson, A. H. Wallbridge, W. A. Smith, A. B. McCallum, J. F. O'Brien, C. Elliott, J. H. Hegler, J. Miller, H. W. Macoomb, W. P. McMahon, J. A. Ritchie, M. Scandrett, W. C. Smith.

The following gentlemen passed the Second Intermediate Examination, *viz*:—

J. A. V. Preston, with honours and first scholarship; A. Collins, with honours and second scholarship; C. D. Scott, with honours and third scholarship; and Messrs. F. W. Carey, G. C. Gunn, W. E. Tisdale, R. G. Smyth, H. Harvey, R. L.

Elliott, J. H. Hunter, R. M. Macdonald, C. McIntosh, J. F. Edgar, R. M. Thompson, J. F. Woodworth, C. A. Ghent, S. D. Lazier, W. G. Burns, H. Miller.

The following candidates were admitted as Students-at-law, *viz.*:—

Graduates—F. J. Fulton, J. J. Maclennan, T. B. Gash, J. McEwen, T. D. Law, J. F. Carmichael, C. B. Dupuis, W. Davis.

Matriculants—A. E. Scanlon, H. T. Berry, J. E. Bird, W. J. Boland, W. I. Dick, W. Farnham, J. F. Jeffery, M. P. McDonagh, J. A. Oliver, R. S. Robertson, W. F. Scott, J. G. Shaw.

Juniors—H. G. Hamilton, D. E. Stuart, G. A. Kingston, H. F. Gault, A. L. Malone, H. M. McConnell, J. F. McMaster, H. E. A. Robertson, T. H. Lloyd, T. W. McGarry, E. Harley, L. B. C. Livingstone, T. B. Martin.

Articled Clerk—W. J. McCamon.

Monday, 21st November.

Convocation met.

Present—Messrs. S. H. Blake, Britton, Bruce, Cameron, Fraser, Hudspeth, Irving, Kerr, Lash, Maclennan, McCarthy, Morris, Moss, Murray, Osler and Smith.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of last meeting were read and approved.

The case of C. R. Fitch was considered, and the case of Hon. G. W. Ross, who had not given a term's notice, was considered.

Ordered that the names of the above-named gentlemen appear in the list of those who have passed the examination this Term, and that their names appear in the list of gentlemen applying to be called to the Bar next Term.

Mr. Moss presented the report of the Committee on Legal Education, on the case of William Mundell, which was received and read.

Ordered for immediate consideration and adopted.

Mr. Moss, from the same Committee, presented the report on the case of A. W. Burk, recommending that he be allowed to present himself for examination and call in Easter Term.

The report was received and read.

Ordered for immediate consideration and adopted.

Mr. Moss, from the same Committee, reported on the case of W. E. Kelly, who passed his Oral Examination this Term, recommending that he be allowed his Second Intermediate Examination, as of Easter Term, last.

The report was adopted and ordered accordingly.

Mr. Moss presented the report of the Special Committee on Honours and Scholarships which was received and read, as follows:—

1. The Committee find that Messrs. J. F. Orde, C. E. Burkholder, W. H. Hunter and A. Constantineau passed the First Intermediate Examination with honours, and that Mr. Orde is entitled to a scholarship of one hundred dollars, Mr. Burkholder to a scholarship of sixty dollars, and Mr. Hunter to a scholarship of forty dollars.

2. The Committee further find that Messrs. J. A. V. Preston, A. Collins and

C. D. Scott passed the Second Intermediate Examination with honours, and that Mr. Preston is entitled to a scholarship of one hundred dollars, Mr. Collins to a scholarship of sixty dollars, and Mr. Scott to a scholarship of forty dollars.

3. That Mr. F. W. Carey obtained the necessary number of marks on the Second Intermediate Examination to entitle him to pass with honours, and to be awarded the third scholarship had he been in due course, but it appearing from the Secretary that Mr. Carey was entered on the books of the Society as a Student-at-law in Easter Term, 1883, and was articled on the 10th July, 1883, and passed his First Intermediate in Easter Term, 1886, he is not under the rules entitled, as of course, to be passed with honours or to be awarded a scholarship.

The report was received and adopted, and it was ordered accordingly.

Mr. Hoskin presented the report of the Discipline Committee on the case of Mr. E. Meek, which was received and ordered for consideration on Saturday, 26th inst.

Mr. Hoskin, from the same Committee, laid upon the table the draft Bill to empower Convocation to examine witnesses on oath, and to suspend practitioners for a limited period, pursuant to the recommendation of the Discipline Committee.

Ordered that it be considered by Convocation on the 26th inst.

Tuesday, 22nd November.

Convocation met.

Present—Messrs. Ferguson, Foy, Irving, Mackelcan, Meredith, Morris, Moss, Murray and Osler.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The Secretary read the report upon the subject of the Buffalo Libraries, and his suggestions based thereupon.

The report was referred to the Library Committee, to act with Messrs. Mackelcan, Osler and Murray.

Saturday, 26th November.

Convocation met.

Present—Attorney-General Mowat, and Messrs. Cameron, Ferguson, Hardy, Hoskin, Irving, McMichael, Morris, Moss, Murray, Osler and Robinson.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, reported on the case of C. J. Atkinson—

That he had now completed his papers and that his time had now expired, but that he had made an affidavit on the 3rd October that he had served his time in full up to November 19th following.

The report was received, read and considered.

Ordered that Mr. C. J. Atkinson be not called to the Bar and do not receive a certificate of fitness until Hilary Term, 1888, and that on the first day of said

Term his certificate be granted, and that he be at liberty to present himself to Convocation for call to the Bar.

Mr. Hoskin, from the Special Committee on Legislation, read the report made by this committee and the proposed amendments of the rules under the Judicature Act to be submitted to the judges, which report was received by Convocation.

Mr. Hoskin presented the report of the Discipline Committee on the case of Mr. E. Meek, which was adopted.

Ordered that the Finance Committee be authorized to purchase the painting of the five judges.

The application of the Elgin Law Association was read and referred to the County Libraries' Aid Committee, with a request that they report at next meeting.

The Secretary presented the letter of Mr. Justice Falconbridge resigning his seat as a Bencher.

The Secretary was directed to call a meeting of the Benchers for the first Tuesday of next Term to elect a Bencher in the place of Mr. Falconbridge.

A letter from the Electric Light Co. was referred to the Finance Committee with power to act.

Friday, 2nd December.

Convocation met.

Present—Messrs. Beaty, Bruce, Foy, Hudspeth, Irving, Kerr, Lash, MacKelcan, Maclennan, Meredith, Morris, Moss, Murray and Smith.

The minutes of last meeting were read and approved.

In the absence of the Treasurer, Mr. L. W. Smith was appointed Chairman.

On motion made, the book showing the attendance of Benchers was laid on the table.

Ordered that Messrs. Bruce, Foy and Hudspeth be a committee to examine the attendance-book to ascertain whether any Bencher has lost his seat by non-attendance for three consecutive Terms, under 34 Vict. c. 15, s. 23.

A letter from Mr. H. R. Hardy, dated November 23rd, was read, asking for the usual grant of $100 to enable him to issue his Annual Legal Chart for 1888, he agreeing to deliver twelve copies of his chart to the Secretary.

Ordered that the application of Mr. Hardy be granted, and that the copies of the chart supplied be distributed through the building.

Ordered that the Finance Committee be authorized to continue the renovation and furnishing of the old lecture and luncheon room, now the Benchers' luncheon room, as they may deem proper.

Mr. Bruce read the report of the Committee appointed to examine and report whether any Bencher had lost his seat by non-attendance.

The report was received and adopted.

The Secretary reported that the difficulty in the case of Ira Standish had been removed, and that he was entitled to be allowed his Second Intermediate Examination as of Trinity Term last.

Ordered that his examination be allowed as of Trinity Term last.

The Secretary reported on the case of R. J. Leslie that, after passing his final examinations this Term, he had died after a very short illness before he had received his certificate of fitness.

Ordered that under the circumstances the fees paid by the late Mr. Leslie, amounting to one hundred and sixty dollars, be refunded to his father.

A letter was read from Messrs. McColl Bros. & Co., dated 29th November, making complaint against a solicitor.

Ordered, that the Secretary reply to the letter, stating that it is not a case for Convocation to deal with.

Some discussion having taken place in regard to the increased lighting of the Library, it was ordered that the Secretary place himself in communication with the Gas Company, to ascertain what arrangement can be made for the introduction of gas as an illuminator in lieu of the arc light, the Electric Light Company being unable to introduce the incandescent light, and the arc not meeting the approval of Convocation.

The petition of the Examiners and Lecturers of the Law Society for an increase of salaries was read, and, by order of Convocation, referred to the Legal Education Committee for consideration and report.

Saturday, 10th December.

Convocation met.

Present—Sir Alexander Campbell and Messrs. Bruce, Foy, Irving, Kerr, Lash, McCarthy, McMichael, Moss, Murray, Osler, Robinson, and Smith.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The Minutes of last meeting were read and approved.

Mr. Murray, from the Reporting Committee, presented the report of that committee, which was received, read and adopted.

Mr. Bruce, from the County Libraries' Aid Committee presented the report of that committee, which was received, read, considered and adopted.

Ordered that the Finance Committee be authorized to pay the grant to the County of Elgin Law Association mentioned in the above report.

The letter of Mr. Langmuir respecting the portrait of the five judges was read and considered, and further authority was given to the Finance Committee.

The Secretary having reported that Mr. Meek had applied to him for the finding of the Discipline Committee on the complaint laid before them against him.

It was ordered that the Secretary be directed to communicate the same to Mr. Meek.

Ordered that the Secretary do report to Convocation on the first day of each Term, and at each meeting of Convocation held between Terms, the names of such elected Benchers, if any, who have failed to attend the meetings of the Benchers for three consecutive Terms.

That such report be then referred to the Committee on Journals and Printing for report to Convocation thereon.

That if such Committee report the seat of any Bencher vacant for the cause mentioned, a day be appointed for taking such report into consideration, and that the Bencher interested be notified of the report and of the time at which it is to be taken into consideration.

Ordered that the question of the retainer and fees to be paid by the Society to the Solicitor, or other system of payment of the Solicitor for his services, be referred to the Finance Committee, to report at the next regular meeting of Convocation

Convocation adjourned.

J. K. KERR, *Chairman Committee on Journals.*

CHANGES IN THE CURRICULUM.

The following changes in the Curriculum of the Law Society come into force at the examinations before Easter Term, 1888:—

1. The second edition of *O'Sullivan's Manual of Government in Canada* is substituted for the first edition of that work in the Second Intermediate Course.

2. *Armour on Titles* is substituted for *Taylor on Titles*, in the course for Certificates of Fitness.

HAMILTON LAW ASSOCIATION.

TRUSTEES' REPORT, ADOPTED AT THE GENERAL ANNUAL MEETING, HELD JAN. 3RD, 1888.

THE Trustees beg to present their Eighth Annual Report, being for the year 1887.

During the year 1887 Mr. Robertson, Q.C., was elevated to the Bench; Mr. Kilvert accepted the Collectorship of Customs; while Messrs. Currell and Lavery ceased to practise in this county, and have thus severed their connection with the Association.

Three new members have been added, viz., Messrs. H. S. Osler, P. M. Bankier, and Thomas Hobson; while R. A. Pringle, who was said in last year's report to have ceased to practise in this county, is again a member, and the present membership is 70.

The annual fees to the amount of $330 have been paid, there being only $7.50 in arrear.

The number of volumes in the library is 2,298, of which 188 were added during the year. The following periodicals are received: English—*The Law Times, The Solicitors' Journal.* American—*The Albany Law Journal.* Ontario—*The Canada Law Journal, The Law Times.*

The Treasurer's Report is submitted herewith, giving a detailed statement of receipts and expenditures, of the liabilities and assets of the Association, and the same is also in the form required by the Law Society.

The Trustees have recently purchased a number of text-books, some of which are yet to arrive from England. In making selections they have availed themselves of the views of the members, and they trust suggestions will continue to be made from time to time.

Of the indebtedness of the Association, mentioned in last year's report, there is unpaid:

The temporary loan for library improvements	$162 76
The balance of McKeown's mortgage	250 00
Balance owing to Mr. Papps	135 00
	$547 76

and it is hoped that increased liberality on the part of the Law Society may enable these to be paid off at an early day, procure the reports still required to render the library reasonably complete, and leave the Association in the future free to devote all its funds to the purchase of the latest text-books and such reports as experience shall show to be required from time to time.

A Committee on Legislation was appointed at the last general annual meeting of the Association, and it is suggested that such Committee be continued.

The subject which has chiefly occupied the attention of the profession during the past year has been the revision of the Rules of Practice.

Owing to the action of the Law Associations throughout the country, and more particularly of those of York, Middlesex and Wentworth, there is every reason to hope that a complete fusion of the Courts with a uniform and consolidated practice may result from what at first promised to be but a collection of all known and existing rules.

The Committee, consisting of Messrs. Martin, Q.C., MacKelcan, Q.C., and Teetzel, have given much valuable time to this question, and the Report of the Joint Committee on Legislation from the County Law Associations, dated 19th November, 1887, shows how fully the suggestions made by this Association in the report dated 4th March, 1887, have been carried into effect.

The Trustees suggest that the same Committee be requested to act again and to use their best efforts to obtain by legislation, if necessary, the reforms which the Association has already expressed as desirable.

The Report of the Committee on Legislation also bears good testimony to the value and influence of the Associations throughout the country, which is flattering to this, the oldest Association in the Province.

The Trustees have obtained from the Law Society a set of text-books for the use of students, which are loaned on the same terms as the series at Osgoode Hall, and should be very useful. Only two students have thus far made the deposit necessary to entitle them to the use of the books.

The Trustees beg to draw attention to the First Annual Report of Mr. Winchester, the Inspector of Libraries, a copy of so much thereof as relates to this Association is laid on the table herewith.

EDWARD MARTIN, *Vice-President.*
E. E. KITTSON, *Secretary.*

Hamilton, 2nd January, 1888.

DIARY FOR JANUARY.

1. Sun ....*1st Sunday after Christmas. New Year's Day.*
2. Mon.. Hair and devisee sitt. begin.
3. Tues....Lord Eldon died, 1838, aged 87.
4. Wed... Chief Justice Moss died at Nice, 1881.
5. Fri.....Epiphany. Christmas vacation ends.
6. Sun .....*1st Sunday after Epiphany.*
9. Mon.....C. C. York sittings for motions, etc.
10. Tues....Court of Appeal sits.
12. Thur...Sir Chas. Bagot, G.-G., 1842.
14. Sat.....C. C. York sittings for motions end.
15. Sun .....*2nd Sunday after Epiphany.*
19. Tues....Lord Langdale appointed M. R., 1836.
22. Sun .....*3rd Sunday after Epiphany.* Lord Bacon born, [1561.
24. Tues....1st Inter. Examination.
26. Thur ...2nd Inter. Examination.
29. Sun .....*Septuagesima Sunday.*
31. Tues....Solicitors' Examination.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

PURDOM *v.* NICHOL.

From Q. B. D.] [Oct. 25, 1887.

P. indorsed a note at four years for the accommodation of N., which N. handed to R. as collateral security for a debt secured to R. by two mortgages on N.'s freehold, the second being in form an absolute conveyance.

After this B. entered into partnership with N., and R. agreed to throw off $1,000 of N.'s indebtedness, which was then $7,323.08, if B. became jointly liable with N. for it. To effect this R. conveyed the freehold to B. and N. for the express consideration of $6,323.08, and B. and N. gave a mortgage to R. at two years for the same amount.

The note was not taken into account in this transaction, and B. knew nothing of it. In less than a year after this B. and N. dissolved partnership, and, as between themselves, B. assumed the liability to R.

When B. came to settle with R., P. had paid the amount of his note, and R. gave credit to B. for the amount so paid. When P. paid the note he had no knowledge of B.'s connection with the matter.

P. claimed from B. the amount of the note on the ground that he had paid it as surety for the debt for which B. was liable, and that B. received the benefit of the payment by the credit given for it on the mortgage debt.

Held, that P. paid his money to the use of N., not of B. P.'s highest right was to be subrogated to the rights of N. as against B. *Semble*, the effect of the transaction between R. and B. and N. was to discharge P.

Idington, Q.C., for the appellant.

Moss, Q.C., for respondent.

Boyd, C., and Osler, J. A.] [Oct. 29, 1887.

Re DWIGHT AND MACKLEM.

Election Case—Contempt of Court—Telegrams—Subpœna—Privilege—45 Vic. c. 93, s. 18 (D.)—Telegraph Company, officers of.

Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness, and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election.

The witness said that he had burnt the telegrams in question with others after being subpœnaed, and while the trial was actually going on, upon instructions received from the General Manager of the Telegraph Company, in whose service he was. He stated that these telegrams, with others, should have been destroyed before, in accordance with a standing rule of the Company, but that he had neglected to do so at the proper time. The instructions to destroy the messages were in the form of a telegram from the General Manager, which was produced by the witness.

Upon the return of an order *nisi* to commit the General Manager and the operator for contempt of court, it was objected that no original subpœna had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in court; and it was argued that the making away with the messages was not a contempt unless the witness was duly subpœnaed to produce.

Held, that the question was not whether there had been a proper service of a subpœna; but whether there had been an interference with evidence which, but for that interference, would have been before the court. The documents were in existence at the beginning of the court; during the trial they were destroyed by the deliberate action of the General Manager, and the court was thereby hindered in the prosecution of an investigation of a public nature. The Manager and operator were guilty of contempt of court.

No privilege attaches to telegrams in the possession of a telegraph company.

45 Vict. c. 93, s. 18 (D.), should not be read as giving an absolute privilege.

The operator was the proper person to subpœna to produce the telegrams, as he had the control of them and the ability to produce them.

H. Cameron, Q.C., for Dwight and Macklem.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [Dec. 24, 1887.

EACRETT *v.* KENT.

Landlord and Tenant—Distress—Assignment.

The tenant of certain leasehold premises executed an assignment under 48 Vic. c. 26 (O.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment.

Held, that the landlord's right of distress was not affected by the assignment;

Held, further, that goods so assigned were not to be therefore deemed *in custodia legis.*

Gibbons, for motion.

Aylesworth, contra.

O'CONNOR *et al. v.* KENNEDY *et al.*

Marriage—Banns—License—Evidence—Bastardizing Issue—26 Geo. II. c. 33; C. S. U. C. c. 102, s. 103; 37 Vict. c. 6, s. 1—Legal presumption in favor of marriage.

In ejectment it appeared that M., one of the defendants, was married to N., 7th Feb., 1866, on one calling of banns, a dispensation having been procured from the Roman Catholic Archbishop for the other two calls, both parties belonging to that faith. Both husband and wife had immediate and continued possession of the land in question under deed to him. Of this marriage was born, 20th Feb., 1867, an only daughter. N. died 3rd May, 1868, and his widow M. on 11th Oct. 1870, intermarried with the defendant K., and they continued in uninterrupted possession until the issue of writ herein. On 11th Jan., 1886, the daughter of M. and N. intermarried with the plaintiff, to whom was born, in wedlock, 3rd July, 1886, though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff, this infant daughter against M. and her husband, the defendant K., they claimed title by possession and denied the validity of the marriage between M. and N., on the ground of the non-publication of banns.

Held, (1) That the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II. c. 33, was in force in Canada as to publication of banns. (3) That 37 Vict. c. 6, s. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favor of marriage.

Maclennan, Q.C., and *Kean*, for motion.

Lennox and *McCosh*, contra.

Chancery Division.

Proudfoot, J.] [Nov. 18, 1887.

Re GILMOUR AND WHITE.

Mortgage—Power of sale—Departure from symbolical short form of power—Trustee as assignee—R. S. O. c. 107, s. 3.

A mortgage under the Short Form of Mortgages Act was made on August 24th, 1874, by E. F. and W. H. F. to T. H. and W. G. T., trustees under the marriage settlement of C. C. H. On October 20, 1877, R. G. was appointed trustee under the marriage settlement instead of T. H. and W. G. T., and the mortgage and lands were granted and assigned to him to hold under the trusts in the settlement. The mortgage contained a proviso for sale on default in payment for one month *without any notice.* Default was made, and R. G. offered the lands for sale by public auction, and T. L. W. became the purchaser, but objected to the title on the ground that R. G. had no power to sell under the power of sale in the mortgage. On an application under the Vendors and Purchasers Act, R. S. O. c. 109, s. 3, it was

Held, that by virtue of R. S. O. c. 107, s. 3, and Imp. Stat. 44 and 45 Vict. c. 41, s. 31, all the powers, authorities and discretions contained in the trust deed are to be exercisable by a new trustee as if he had originally been nominated a trustee by the deed creating the trust; that the original trustees had power to sell; that the new trustee stepped into their place, and could exercise all the powers for realizing the trust property; that they had not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust, and that a good title could be made by R. G. to the purchaser.

R. L. Fraser, for the purchaser.

Jas. Reeve, for the vendor.

Ferguson, J.] [Nov. 30, 1887.

Re GREEN AND AITKIN.

Vendors and Purchasers Act, R. S. O. c. 109—Variation of power of sale in short form of mortgage—Month substituted for months.

G. was assignee of a mortgage made pursuant to the Act respecting Short Forms of Mortgages, which contained a power of sale in the words "Provided that the said mortgagee on default of payment for one month may, on giving notice in writing, enter on and lease or sell the said lands."

In an application under the Vendors and Purchasers Act, R. S. O. c. 109, when the purchaser contended that the substitution of "one month" for "months" was such a variation of the form that G. as assignee could not make title.

Held, that G. could make a good title, and the purchaser must accept it.

Muir, for the vendor.

F. E. Hodgins, for the purchaser.

Boyd, C.]

Re LONDON STEEL WORKS COMPANY—DELANO'S CASE.

Corporations—Contributory—Variation from prospectus in respect to amount of capital.

D. subscribed for 50 shares in a company to be formed, of which the capital was, according to the prospectus, to be $75,000 in 750 shares of $100. Subsequently the promoters obtained letters patent under the R. S. O. c. 150, by which the capital was fixed at double the amount, viz., $150,000 in $100 shares. This change was not communicated to D., nor was there any allotment of stock to him, no entry of his name in any stock book, no acting on his part as shareholder. The Company was in process of winding up.

Held, that D. was not liable as a contributory in respect to any shares.

The amount of a company's capital is one of of those things which, when fixed, cannot be varied without the consent of all who join the company. Here there was an important and material variance between the prospectus and the charter of the company, to which D. did not consent, and of which he was not informed till after the winding up had begun.

G. C. Gibbons, for the company.

M. D. Fraser, for the alleged contributory.

Full Court.] [Dec. 21, 1887.

MORGAN *v.* MORGAN.

Dower—Damages for detention—Alienation of husband.

Held, That a widow cannot recover damages for detention of dower when her husband did not die seized, even though she made demand for dower.

Lash, Q.C., for the defendant (appellant).

Idington, Q.C., for the plaintiff (respondent).

Full Court.] [Dec. 21, 1887.

JONES *v.* MCGRATH.

Husband and wife—Direct deed from husband to wife.

The plaintiff purchased the lands in question from Susan McGrath for $3,000, received a conveyance dated March 28th, 1887, and paid the purchase money. Susan McGrath was the wife of James McGrath, who had by a previous deed, dated October 18th, 1884, conveyed or purported to convey the lands to her for an expressed consideration of $100. The plaintiff now claimed possession of the lands against James McGrath, who defended on the ground, that his deed to his wife was void.

Held, That the non-suit directed by the trial judge must be set aside and a new trial ordered, for that the said learned judge had erred in holding that the conveyance from the husband to the wife was necessarily void to all intents and purposes.

Full Court.]

GUILDING *v.* DEEMING.

Chattel mortgage—Security for goods to be subsequently delivered—Insolvency—48 Vict. c. 26, s. 3.

Appeal from the judgment of Rose, J., on the trial of an interpleader issue. The plaintiff claimed, upon a certain chattel mortgage, certain goods of V., the judgment debtor. The defendant was the execution creditor. The mortgage was made on April 26th, 1886, upon furniture and stock-in-trade, present and future, of V. It was to secure advances on goods to be made within seven months, and to the extent of $1,000. Goods were supplied thereunder from time to time up to Nov. 12, 1886, to the value of $620.75. V. prosecuted her business till August 10th, 1887, when the sheriff seized. V. appeared to have been insolvent when the chattel mortgage was given, but not to the knowledge of the plaintiffs. There was no evidence of fraud and the transaction was an honest one throughout.

Held, That the transaction was within the meaning of 48 Vict. c. 26, s. 3, (1) and the mortgage was made by way of security for a present actual *bona fide* sale and delivery of goods. The mortgage became operative only as and when the consideration therefor from time to time arose by the delivery of the goods. And it then attached upon the chattel property only to the extent of the actual value of the goods supplied from time to time. The mortgage was therefore valid.

H. J. Scott, Q.C., for the plaintiff.

Akers, for the defendant.

Practice.

MacMahon, J.] [Dec. 22, 1887.

REGINA *v.* COLLIER.

Canada Temperance Act—Information—Date of offence—Irregularities—R. S. C. c. 178, s. 87—Warrant of commitment.

An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken before the Police Magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction showed that the Act was in force where the offence was alleged to have been committed.

Held, that it was no objection to the conviction that it did not state the particular date of the offence, or that the Act was in force in the place where it was alleged to have been committed; in any case, these defects in the information were mere irregularities and were cured by R. S. C. c. 178, s. 87.

Held, also, that it was no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant.

Held, lastly, that the commitment of the defendant to the gaoler of the common gaol of the county in which the defendant was convicted was proper.

Osler, J.A.] [July 4, 1887.

In re LINCOLN AND NIAGARA DOMINION ELECTION PETITION, PATTESON *v.* RYKERT.

Election Petition — Alteration — Spoliator — Ratification—Amendment—Appeal allowed by consent—Costs.

After an election petition had been filed two clerks of the Toronto agents of the solicitor for the petitioner were allowed to compare it with an engrossed copy, and finding that the two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent, after this alteration, corresponded with the petition as altered. It was not shown, and it was denied, that the petitioner knew of the alteration.

Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the respondent or his solicitor. As the document was in the possession of the court, such an alteration, made by persons who were mere strangers or spoliators,

had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent.

It was ordered that the petition served should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed.

By consent of the petitioner, the Supreme Court of Canada allowed an appeal from the decision of Osler, J.A., and sustained the preliminary objections, but without costs.

Galt, J.] [29th October.
Chy. Divisional Court.] [7th Dec., 1887.

In re McQUILLAN AND THE GUELPH JUNCTION RAILWAY CO.

Arbitration—Disqualification—R. S. C. c. 109, *s.* 8, *ss.* 28—"*The Judge*"—*Divisional Court—Appeal—Certiorari.*

A motion was made to Galt, J., under R. S. C. c. 109, s. 8, ss. 28, to determine the validity of the cause of disqualification urged by land-owners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was that the arbitrator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only.

Held, by Galt, J., that the arbitrator was not disqualified.

Held, by the Chancery Divisional Court, that no appeal lay to the Divisional Court from the decision of the Judge acting under the Statute.

Held, also, that the Divisional Court had no power to remove the proceedings by *certiorari*.

J. L. Murphy, for the land-owners.

Aylesworth, for the Company.

Ferguson, J.] [Nov. 25, 1887.

Re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition.

A father was proceeding by *habeas corpus* to obtain an order awarding him the custody of his infant children.

Held, that a more comprehensive adjudication could be had upon a petition, and that there was jurisdiction to direct that a petition should be substituted for the *habeas corpus* proceedings; and such a direction was given where it appeared to be in the interest of the infants and all concerned.

J. Maclennan, Q.C., and *H. J. Scott*, Q.C., for the father.

S. H. Blake, Q.C., and *H. Cassels*, for the mother.

Rose, J.] [Nov. 23, 1887.

ROGERS *v.* WILSON.

*Mortgagor and mortgagee — Assignment of mortgage to third party—*49 *Vict. c.* 20, *s.* 7 (*O.*)—*Motion for judgment — Rule* 322—*Admissions in affidavit on former motion.*

The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third party for execution by the plaintiff, under 49 Vic. c. 20, s. 7 (O.). The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge, and the defendant moved for a *mandamus* to compel him to execute an assignment.

Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment.

This motion having been dismissed, a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and refusal were set up. The plaintiff then joined issue. There was no reference in the pleadings to the second mortgage. On motion for judgment under Rule 322:

Held, that the admissions in the affidavit of the defendant used on the former motion could be read upon this motion; and that, in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit.

Held, also, that a motion under this rule is properly a court motion.

A. M. Taylor, for the plaintiff.

C. C. Robinson, for the defendant.

Boyd, C.] [Dec. 14, 1887.

BRITISH CANADIAN LUMBER & TIMBER CO. *v.* GRANT.

Company winding up — Order of Foreign Court—Defence—Res judicata.

In the course of proceedings taken in Scotland for winding up the plaintiffs' Company, an order was made by a Scotch court for delivery by the defendant, as one of the officers of the Company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant who lived in Ontario, in any court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose.

Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in winding-up a proceeding to pronounce an order equivalent to a final judgment on the merits based upon service of a person out of the jurisdiction of the Scottish court.

And an order striking out the defence in the action on the ground that it was *res judicata* by the order of the Scottish court was rescinded.

Semble, that the order should have been limited to such books and papers as were in the hands of the defendant at its date.

W. H. Lockart Gordon, for the plaintiff.

Hoyles, for the defendant.

Boyd, C.] [Dec. 14, 1887.

In re ALPHA OIL COMPANY.

Company winding up—Appointment of Liquidator—Costs.

Upon a contest for the appointment of liquiquidator in a winding-up proceeding, it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal, will act upon their recommendation.

And where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the Sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the Company's operations were carried on and where all its books and assets were, and was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was othewise well qualified for the position, the court appointed him liquidator.

The rule as to costs suggested in Re *Northern Assam Tea Co.*, L. R. 5 Ch. App. 644, followed.

Arnoldi, for the petitioning creditors.

Hoyles, for the Company and certain of the shareholders.

C. J. Holman, for the sheriff and certain of the creditors.

Mr. Dalton, Q.C.] [Dec. 16, 1887.

In re IRVINE, A SOLICITOR.

Attachment of debts—Order for costs only.

The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay.

Any doubt existing upon the English cases and the Ontario Judicature Act Rules is cleared up by R. S. O. c. 66, s. 72.

W. M. Douglas, for the solicitor.

Chy. Divisional Court.] [Dec. 21, 1887.

MCKAY *v.* BAKER.

Costs, security for—Husband and wife—Nominal plaintiff.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband, when in embarrassed circumstances, had bought the land, and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife.

Held, reversing the order of Proudfoot, J., in Chambers, that though suing alone and

without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff in the title was the wife, and her husband could not be joined as a necessary, or even proper, party. This case did not come within the class of cases where a nominal and insolvent plaintiff is put forward, while the substantial litigant keeps in the background in order to avoid liability for costs; and an order for security for costs was set aside.

C. J. Holman and *A. D. Cameron*, for the plaintiff.

Lynch Staunton, for the defendant.

Chy. Divisional Court.] [Dec. 21, 1887.

PIERCE *v.* PALMER.

Appeal—Waiver—Motion to extend time for complying with order appealed from.

By an order of Boyd, C., 12 P. R. 275, a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend upon paying into court or securing $700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity.

Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it.

C. J. Holman, for the appeal.

Hoyles, contra.

Chy. Divisional Court.] [Dec. 21, 1887.

REID *v.* MURPHY.

Interpleader—Sale of goods—Sheriff's charges.

The decision of Proudfoot, J., 12 P. R. 246, was reversed on appeal.

After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the court under the Act relating to interpleading arises, by which the writ of execution, as such, ceases to operate; and the sheriff, in selling the goods seized thereunder, acts not for the execution creditor, but for the court under the interpleader order. Where, therefore, a sheriff, under such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, and paid the proceeds into court less his charges for possession money and expenses of sale, etc.

Held, that he was not liable to refund to the claimant the amount deducted for such charges.

The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way.

Miscellaneous.

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Latest additions:

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Abbott's Patent Law of all Nations, 2 vols., Washington, 1886.
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American and English Railroad Cases, 28 vols., Northport, 1881-7.
Archbold's Quarter Sessions, 4th ed., London, 1885.
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Black's Proofand Pleadings in Accident Cases, Jersey City, 1886.
Blunt's Church Law, 4th ed., London, 1885.
Bray on Discovery, London, 1885.
Browne (J. H. B.) Law of Rating, 2nd ed., London, 1886.
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Cavanagh's Law of Summary Judgment under Order XIV., London, 1887.
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Craven on High Bailiffs, London, 1887.
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Cuthbertson's Test of Domicile, London, 1887.
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Dickson's Law of Evidence, Edinburgh, 1887.
Dove's Public Rights in Navigable Rivers, London, 1887.
Drake on Attachment, 6th ed., Boston, 1885.
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Irish Law List, Dublin, 1887.
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Kinnear on Civil Government, London, 1887.
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Lloyd on Divorce, Boston, 1887.
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Morrill on Witnesses, New York, 1886.
Morrill on City Negligence, New York, 1887.
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McGrath on Doctrine of *Cy Pres*, Philadelphia, 1887.
Newmark on Sales, San Francisco, 1887.
New York State Railroad Laws, Albany, 1887.
North-eastern Reporter Digest, vols. 1-10, St. Paul, 1887.
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O'Sullivan's Government in Canada, 2nd ed., Toronto, 1887.
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Short's Informations, Mandamus and Prohibition, London, 1887.
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Smith (J.W.) Private Trading Partnerships, London, 1887.
Snyder on Clubs, New York, 1886.
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Stewart's New Jersey Digest, 3 vols., Trenton, 1876-87.
Tarring's Consular Jurisdiction in the East, London, 1887.
Thomas on Mortgages, 2nd ed., New York, 1887.
Throop's Massachusetts Digest, 2 vols., New York, 1887.
U. S. Supreme Court Digest, 2 vols., Rochester, 1887.
Vaizey's Settlements of Property, London, 1887.
Wade on Attachment, 2 vols., San Francisco, 1887.
Walker's American Law, 9th ed., Boston, 1887.
Washburn on Easements and Servitudes, 4th ed., Boston, 1885.
Welty on Assessments, New York, 1886.
Wiltsie on Mortgage Foreclosure, Rochester, 1885.
Williams on Personal Property, 13th ed., London, 1887.
Williams on Real Property, 16th ed., London, 1887.
Wright & Carson's Criminal Conspiracies, Philadelphia, 1887.
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THE *Ontario Legal Chart* for the year 1888, compiled by H. R. Hardy, Esq., of Osgoode Hall, Barrister-at-law, contains, as in former years, a great amount of valuable information. It has come to be regarded as indispensable in the office of almost every member of the legal profession. In appearance, contents, etc., the chart for the present year is similar to those of previous years. It has been carefully revised to bring all its statements down to date.

The Canada Law Journal.

VOL. XXIV. FEBRUARY 1, 1888. NO. 2.

IN reference to the case of *Saylor* v. *Platt*, as to which we gave in our last number for 1887, a form of order for particulars in an election case, we find that the only point decided was as to the time for giving particulars in an election case. The learned judge stated, in giving judgment, that he would not follow his former decision in *Dickson* v. *Murray*. 19 C. L. J. 211, in which he held in accordance with the modern English practice that the time should be seven days, as he found that this view had not been generally adopted by other judges. For the sake of uniformity he would therefore follow the former practice, and make the order for delivery of particulars fourteen days before trial.

JUDGE F. MILLER, one of the nine judges of the Supreme Court of the United States, contributes an able article to the last number of the *American Law Review* on "The System of Trial by Jury." After tracing the history of trial by jury in the United States, he says that his practice in the courts, before he came to the bench, had left on his mind the impression that in civil suits juries were of doubtful utility. He would then have preferred a court composed of three or more judges, so selected from different parts of the circuit as to prevent any preconcerted action or agreement of interest or opinion, to decide all questions of law and fact. He now thinks that this preference was largely owing to the popular and frequent election of the judges of the court in which he was practising, and to their insufficient salaries. They were neither very competent as to their learning, nor secure in their positions. They could not, therefore, exercise that control over the proceedings, in a jury case, and especially in instructing the jury upon the law applicable to it, which is essential to a right result in a jury trial. A case left to the unregulated discretion of a jury, without that careful discrimination between matters of fact and matters of law which it is the duty of the court to lay before them, is little better than a popular trial before a town meeting. The judge should clearly and decisively state the law, which is his province, and with equal precision point out to the jury the disputed questions of fact, which it is their duty to decide.

An experience of twenty-five years on the bench has convinced the learned judge that, when the principles above stated are faithfully applied, a jury is in the main as valuable as an equal number of judges would be, or any less number. His experience in the conferences of the United States Supreme Court is that the nine judges come to an agreement very readily upon questions of law, while they often disagree in regard to questions of fact which are as clear as the law. His conclusion is that judges are not pre-eminently fitted, over other men of good judgment on business affairs, to decide upon mere questions of disputed fact.

The learned judge thinks it a hardship, however, in civil cases, that one or two jurors may prevent the decision of a case, where the other ten or eleven are quite agreed as to the verdict. Civil trials go by the preponderance of evidence, upon a balancing of the weight of testimony, and the contention is that it would be a useful extension of the principle, if some less number than the whole jury should be authorized to render a verdict. The number required to concur in the verdict should probably, the learned judge thinks, be as high as nine.

Trial by jury in criminal cases stands upon different ground. Here unanimity should be required. It is not a matter of preponderance of evidence, but of reasonable certainty. It is better that nine guilty men should escape than that one innocent man should be found guilty.

Exception is also taken to the rules governing the disqualification of jurors. These too often result in excluding the intelligent man, and accepting the ignorant one. The old principle of the English law that a man should be tried by a jury of his neighbours, has ceased to have any place in the system of criminal jurisprudence. The man who takes an interest in what is going on in public life, who reads the journals, and who is familiar with rumour and the current of public opinion, becomes, in the United States, disqualified, if they have had any influence in forming an opinion in his mind. The ignorant and stupid are often the remnant who try the defendant. This difficulty does not, of course, arise in this country.

WE are in receipt of a letter from an esteemed correspondent who writes in reference to the article on "The Law of Divorce" which appeared in our last number, but it arrived too late for insertion in this issue; we shall have pleasure in laying it before our readers at an early date. Discussions on the same topic are, we observe, not confined to Canadian journals, though the tenor of the remarks made, and the nature of the evils complained of, are somewhat different among our neighbours from what they are in Canada.

The American Law Review has an article on Divorce Legislation in which it is contended that any attempt to secure uniformity in the divorce laws of the various states, by means of national legislation, is needless. It is contended that the hardships which result from divorce proceedings are not so much a consequence of the diversity of causes for which divorces are granted, as of the refusal of some of the states to recognize as valid, decrees granted in other states in which but one of the divorced parties resides. While hardship may, and doubtless does, result from that cause, it must, we think, be conceded that national legislation would secure uniformity. *The Review* seems to think that the lapse of time will best bring about that result, through the growth of public sentiment, which, it asserts, is strongly in favour of two things, viz., not to grant divorces except for adequate causes, and to hold decrees valid where rendered, valid everywhere. Two of the chief evils of the American system are inadequately dealt with. One of these is the insufficiency of the grounds on which divorce is granted; the other is the loose, and often fraudulent, way in which the law, such as it is, is too often administered in many of the so-called courts.

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WE are somewhat interested in noticing in our esteemed contemporary, *The Law Quarterly Review*, at page 121 of the current number, a reference to this journal, in which the authors say that it is rather hard to find the enterprise of the Blackstone Publishing Company, of Philadelphia, in reprinting pirated editions of English text-books commended by their own fellow-subjects. *Interdum dormitat Homerus*, and we are inclined to think that *The Law Quarterly* was writing with less precision of thought than is habitual to it, which may perhaps be accounted for by the fact of the remarks coming at the very end of its usual able review of current cases and items of interest. The expression "pirated" is, in the first place, a begging of the question, because, no doubt, piracy in the sense of robbery is necessarily wrong and not to be commended either by British subjects or by anybody else, but the real question is, whether it is possible to uphold the proposition that there is anything to be deprecated or blamed in Americans reprinting English copyright works under the present state of the copyright law. We will make, perhaps, the weakening admission that we, that is to say the writer, must own up to having had some qualms of conscience in subscribing to the Blackstone Publishing Company Series; but upon consulting a friend, in whose judgment on such subjects he has much reliance, he was met by a quotation of the text in the Bible about buying whatever is exposed in the shambles, asking no questions for conscience sake. We must confess that this appears to us a very insufficient way of meeting the point. In the case of the Blackstone Series there is no need of asking questions, inasmuch as they bear upon their very frontispiece the history of their shame, if shame it be; but we think that *The Law Quarterly Review* must either be prepared to support the proposition that these reprints are illegitimate morally (for obviously they are not illegal actually), or else it must confess that its observations to which we have above referred, are not founded on right reason. It seems to us that the right which is called copyright, is purely a matter of artificial creation, and that it would be quite conceivable to create a private and exclusive right in what a man says in ordinary conversation, that is to say, that it would be quite conceivable for the law to confine to the individuals, who utter brilliant remarks in conversation, the right of reproducing them either verbally or in writing, and thus very much injure the trade of many brilliant writers in the present day who write excellent books full of the conversational witticisms of other people; but because no such law exists anywhere, it has not entered, probably, into the head of anyone to say that it is wrong for such writers to utilize gems of thought which are not of their own creation. The mere fact, that in the case of copyright in certain countries and within certain limits, books which are published by the authors cannot be reproduced by other people without the author's consent, is surely no argument for saying that in places to which that copyright does not extend they may not be properly introduced. We are not writing this so much for the sake of propounding any theory on the subject ourselves, as for inviting our contemporary, to whom we gladly concede the blue riband of legal journalism,

to take up the subject and discuss it with its usual ability in some future number. We say nothing as to any rights or remedies English authors may have as to preventing the sale of this series in Canada. If they have any such rights they must come forward and enforce them, or expect the matter to go against them by default.

LEGAL ASPECT OF DISALLOWANCE IN OLD MANITOBA.

THE issue of this journal, of the first of December, contains an article entitled, "Disallowance—Manitoba and the North-West," contributed by "W." This article has attracted considerable attention in Manitoba, though the interest aroused by it was not due so much to its intrinsic merit, as to the manner in which the writer promulgated arguments which, it is submitted, have long been abandoned by even those who most warmly espouse the cause of monoply. Two contentions were made. One, that in reference to the Red River Valley Railway Act, was as follows: "The Provincial Act seems to have been beyond the powers of the Provincial Legislature under s. 94 (92?) of the B. N. A. Act; (*a*) as relating to a railway 'extending beyond the limits of the Province,' if not according to the letter, certainly according to the spirit of the said section, which expressly applies to railways connecting one province with another, and could hardly be intended not to apply to a railway connecting, as this was avowedly intended to do, a province with a foreign country. Sec. 91 of the B. N. A. Act, expressly subjects ferries between a province and any foreign country to the exclusive jurisdiction of the Dominion Parliament; and for good reason, any such ferry (and a portion of any such railway as that in question) requiring attention and regulation by the Dominion Customs Department."

The section of the B. N. A. Act referred to (92, not 94) is as follows:—

"XCII. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . .

"(10) Local works and undertakings other than such as are of the following classes:

"(*a*) Lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

"(*b*) Lines of steamships between the province and any British or foreign country;

"(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."

The Red River Valley Railway did not come under (*c*) because it was not "declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces;" the reverse, if

anything, was declared by Parliament. It did not come under (*b*), because it was not a line of steamships between Manitoba and any British or foreign country unless we call it a line of steamships by analogy, the original means of transport in Manitoba, the Red River carts, having been termed "prairie schooners." Nor does it come under that portion of (*a*) which excepts "lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other or others of the provinces. That was a useful provision to prevent one province from trespassing upon the jurisdiction of another or others; but, as the Red River Valley Railway, whatever horrible things it was to do, did not propose to touch in or upon any other province, that portion of (*a*) does not apply to it. The only question is, what was meant by that other portion of (*a*), which excepts railways, etc., "extending beyond the limits of the province," from the local undertaking in relation to which the provinces "may exclusively make laws?" Was the Red River Valley Railway as projected a railway "extending beyond the limits of the Province?" It certainly was not; it was to go to the boundary, and no farther. But, it is said, it transgresses the spirit of the B. N. A. Act, because the section "expressly applies to railways connecting one province with another, and could hardly be intended to apply to a railway connecting, as this was avowedly intended to do, a province with a foreign country." Why not? The object in preventing one province from incorporating a railway to run over another province seems to have been to render it impossible for one province to trespass upon the jurisdiction of another. What could be the object in providing that a province may not "exclusively make laws" in relation to a railway passing from a province into a foreign country? Could the Dominion Parliament itself make laws in relation to railways extending into foreign countries? Evidently not. But, it is added, "sec. 91 of the B. N. A. Act expressly subjects ferries between a province and any foreign country to the exclusive jurisdiction of the Dominion Parliament," and from this it is argued that any railway connecting with a foreign country comes within the jurisdiction of the Dominion Parliament. On the contrary, the very fact that (*b*) expressly refers to "lines of steamships between the province and any British or foreign country," shows that when "lines of steam, or other ships, railways," etc., are mentioned in (*a*), no reference is intended to be made to connections with foreign countries which are provided for in (*b*). As a matter of fact, or rather of law, this whole question was decided in the Supreme Court of New Brunswick, in 1871, in the case of the *European and North American Railway Company for the extension from St. John's westward* v. *Thomas*, when Chief Justice Ritchie, now Chief Justice of the Supreme Court of Canada, held that just such a railway as the Red River Valley Railway, which was being built to the International boundary, there to meet an American line, was within the powers of New Brunswick to construct. The judgment, which was concurred in by Allen, Weldon, and Fisher, JJ., was as follows:—

"But it is claimed to have been shown by evidence outside the Act that, at the time it was passed, and also at the time of the passing of 32 Vict. c. 54, it was contemplated and intended by the promoters of the undertaking to connect

with a line of railway to 'be built in the United States to meet the E. & N. A. Railway for extension from St. John, westward,' at the boundary of the United States, and, therefore, it is contended, it was a railway extending beyond the limits of the Province. But we think we have no right to look to intentions or anticipations, or doings of parties outside the Provincial Legislature, either in the State of Maine or in the Province of New Brunswick, and that the intention of the Legislature, as expressed in the Act, alone can control us—that the fact of the Legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own Legislature to legislate on, and deal with, railway undertakings; provided always, such railways do not connect the Province with any other or others of the provinces, nor extend beyond the limits of the Province.

"This is the simple question, and all we have to consider in determining on the validity of the Act. As to any possible or probable connection of the railway authorized to be constructed under this Act (which may have been thought of at the time of passing the Act) with a line or lines of railway to be constructed, not under the authority of these Acts, in the United States, we have nothing to do. We therefore think this is a local work and undertaking other than such as are of the classes enumerated in paragraphs *a*, *b*, and *c*, to ss. 92, in relation to which the Legislature of this Province may exclusively make laws."

This judgment stands unreversed. The fact that in the recent injunction cases in this Province no serious attempt was made to question its validity, and the further fact that a railway is being constructed under an Ontario charter from Port Arthur, south-westward to a point on the United States boundary, and that its constitutionality is not even questioned, seem to indicate that, so far as the B. N. A. Act is concerned, Manitoba has an undoubted right to build all the railways to the boundary she may desire. Then what is meant when railways "extending beyond the limits of the provinces" are excepted from the list of local works in relation to which the provinces may exclusively make laws? There seems to be no reason why that portion of s. 92 should not apply exclusively to lines projected to run from a province into a territory, as for instance, from Manitoba into the North-West Territories, as the Territories come under Dominion jurisdiction exclusively.

The other contention is, that under the monopoly clause (clause 15) of the Canadian Pacific Railway Contract, the Dominion agreed to give the C. P. R. a monopoly in all that country south of its line from Lake Nipissing to the Pacific Ocean, except "such as shall run south-west, or to the westward of south-west." The monopoly clause referred to is as follows:—

"For twenty years from the date hereof no line of railway shall be authorized by the Dominion Parliament to be constructed south of the Canadian Pacific Railway from any point at or near the Canadian Pacific Railway, except such a line as shall run south-west or to the west of south-west, nor to within fifteen miles of latitude 49, and in the establishment of any new province in the North-west Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period."

That is, the Dominion Parliament undertakes not to authorize the construc-

tion of any railway south of the Canadian Pacific Railway with certain exceptions for the term of twenty years.

The Dominion Parliament might agree to refuse to "authorize" the construction of such railways for a thousand years, but that would not affect Manitoba's rights. Railways chartered by provincial legislatures are not "authorized" by the Dominion Parliament, and never were since the passing of the British North America Act. There would be no sense, then, in the construction it is sought to place upon the monopoly clause. What it meant was that the Dominion Parliament would not "authorize" such railways in the territories over which it, and it alone, exercised control. The latter part of the monopoly clause, namely, the provision that "in the establishment of any new Province in the North-West Territories, provision shall be made for continuing such prohibition," plainly reveals the knowledge that the erection even of a portion of the North-West Territories into a province would *eo ipso* take it out from under the yoke of monopoly, and place it in a position to build as many competing railways to the boundary as it might desire. It was expressly provided, in accordance with this, that the territory taken from the North-West, and added to Manitoba, should be subject to the monopoly clause. If it was necessary to enact that upon the erection of any portion of the already monopoly-ridden territories into a province, express provision should be made in order to continue its subjection to monopoly; why was it not necessary to make a similar express provision in relation to Manitoba, which was already an autonomous province? How is it possible to argue, then, that the monopoly was intended to apply to old Manitoba?

I might quote the speeches of Sir John A. Macdonald and Mr. Thomas White, in the Dominion Parliament, when the Canadian Pacific Railway was up for ratification in February, 1881; the speech of Sir Charles Tupper in 1884, on the application for the $30,000,000 loan; Hon. Thomas White's remarks to the Junior Conservatives of Winnipeg last March, and the assurance of the Minister of Justice to the Winnipeg Board of Trade in May last; but your contributor states that he does not care what the ministers said, but merely for the actual requirements of the law, and to the public the quotations from ministerial speeches on the Canadian Pacific Railway contract are sufficiently trite. It suffices to say that in all of them we have been assured again and again that neither the British North America Act nor the Canadian Pacific Railway Contract required monopoly in old Manitoba. The Red River Valley Railway Act was disallowed simply to carry out the trade policy of the Government, and not for the so-called reasons which your contributor has assigned.

WINNIPEG. F. C. W.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We now continue our notes on the cases in the first instalment of the Law Reports for December.

SALE BY DIRECTOR TO COMPANY—RATIFICATION AT GENERAL MEETING—VENDOR'S RIGHT TO VOTE AS SHAREHOLDER.

In the much litigated case of *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589, the Judicial Committee reversed the decision of the Supreme Court and restored the judgment of the Court of Appeal. The simple point in the case was whether or not a director of a company, who had entered into a voidable contract to sell certain property to the Company, was entitled to a vote as a shareholder at a general meeting called to ratify the contract. The Chancellor held that he could not (16 Ont. R. 300), the Court of Appeal held that he could (11 App. R. 205), the Supreme Court thought the Chancellor was right and reversed the decision of the Court of Appeal (12 S. C. R. 598), and now the Privy Council think the Supreme Court was wrong, and the Court of Appeal was right.

MARINE INSURANCE—BURSTING OF ENGINE—PERILS OF THE SEA.

Thames M. I. Co. v. *Hamilton*, 12 App. Cas. 484, is an appeal from the case of *Hamilton* v. *Thames M. I. Co.*, 17 Q. B. D. 195, noted *ante* vol. 22, p. 299. In this case a steamer was insured by a time policy in the ordinary form, on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was used for filling the main boilers, when, owing to accident or negligence, a valve was open which ought to have been shut, and the water was forced into and split open the air chamber of the donkey-engine. The Divisional Court of the Queen's Bench Division, and the Court of Appeal, held that the damage to the engine was covered by the insurance, but the House of Lords reversed the decision, holding that whether the injury were due to accident or negligence, the loss did not fall under the words "perils of the seas," nor under the general words "all other perils, losses and misfortunes, that have, or shall come to the hurt, detriment, or damage, of the subject-matter of insurance." *West India Telegraph Co.* v. *Home and Colonial Insurance Co.*, 6 Q. B. D. 51, on which the Courts below relied was disapproved, their Lordships being unanimously of opinion that the general words only covered other losses, *ejusdem generis*, as those specifically mentioned.

LUNATIC OUT OF JURISDICTION—RIGHT OF FOREIGN OFFICIAL CHARGED WITH CARE OF LUNATIC TO PROPERTY OF LUNATIC IN ENGLAND.

Proceeding now to the cases in the Chancery Division *in re Barlow*, 36 Chy. D. 287, is the first to call for notice. In this case, a lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled to the income (about £30 a year) of a testator's residuary estate, and was also absolutely entitled to £2,000, which had arisen from accumulations of the income. She had been maintained by the Colonial Government, at a total expense of

£803. By a local Act of New South Wales, extensive powers of management of the property of "lunatic patients" (*i.e.* persons detained as lunatics, but not so found by inquisition), were given to the Master in Lunacy in New South Wales, and he was entitled to sue for, and receive debts due to, the patient, but the Act did not vest the patient's property in him. The Master claimed to have the accumulations which were in England paid to him, upon which the trustees paid them into court, under the Trustee Relief Act. The Master then petitioned to have them paid out to him. Kay, J., ordered the £803 to be paid to him, and also the income of the remainder of the fund, as long as the person entitled should be detained as an insane patient in New South Wales, and authorized the trustees to pay him the patient's share of the income of the residuary estate, which the trustees undertook to do. The Master in Lunacy appealed from this order, but the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) held that, though in New South Wales the Master could enforce payment of any sums due to the patient, still, as the patient had not been found lunatic, and the property was not vested in the Master, he could not compel payment of any money due to the patient from persons in England, and his claim to have the whole of the accumulations paid to him was refused. But it was held that the English trustees were justified in paying over to the Master anything which the competent authority of New South Wales decided to be necessary for the maintenance or benefit of the patient, and the payments which had been directed, were upheld, but no case having been made to show that more was required for the comfort or benefit of the patient, it was held that Kay, J., was right in refusing to order anything further to be paid. We believe a similar point was recently before Proudfoot, J. in the Chancery Division in *Charteris* v. *Charteris*, in which the question was whether the corpus of a fund in the province to which a lunatic resident in Scotland was entitled, should be paid to her *curator bonis* in Scotland, and he held that the mere fact that he was *curator bonis* did not entitle him to receive the corpus.

CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY—UNCERTAINTY.

In re Clarke, Coombe v. *Carter*, 36 Chy. D. 348, the Court of Appeal affirmed the decision of Kay, J., 35 Chy. D. 109. In this case a mortgagor, by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled under any settlement, will, or other document either in his own right, or as the devisee, legatee, or next of kin of any person," and also all real and personal property "of, in, or to which he was, or during that security should become beneficially seized, possessed, entitled or interested, for any vested, contingent, or possible estate or interest." The mortgagee having afterwards become entitled under a will to a share of the personal estate of the testator, the question arose between the trustee in bankruptcy of the mortgagor's estate and the mortgagee, whether this share passed under the assignment of after-acquired property. It was contended on behalf of the liquidator that the clause purporting to assign after-acquired property was too vague. But the Court of Appeal (Cotton, Bowen

and Fry, L.JJ.), affirming Kay, J., held that the assignment of after-acquired property was divisible, and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the court gave no decision, the assignment for valuable consideration of all moneys to which the mortgagor should become entitled under a will operated as a contract which the court would enforce, and that the share of the personal estate in question therefore passed under the mortgage.

COMPANY—WINDING UP—REMOVAL OF LIQUIDATOR—APPEAL BY LIQUIDATOR AGAINST ORDER REMOVING HIM.

In re Adam Leyton, 36 Chy. D. 299, was a proceeding under the Winding-up Acts in which the question of the jurisdiction of the court to remove a liquidator was discussed, and it was held by the Court of Appeal, affirming North, J., that the jurisdiction of the court to remove a liquidator "on due cause shown" is not confined to cases where there is personal unfitness, but that whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company being wound up, that a liquidator should be removed, it has power to remove him and appoint a new one. It was also held by the Court of Appeal that a liquidator who has been removed has a right to appeal from the order removing him.

RESTRAINT OF TRADE—PUBLIC POLICY—COVENANT "SO FAR AS THE LAW ALLOWS" TO RETIRE FROM BUSINESS.

This number of the reports is rich in cases on the law of covenants in restraint of trade. The first of these is *Davies* v. *Davies*, 36 Chy. D. 359. In this case, on a dissolution of partnership, the retiring partner, who received a large sum of money, covenanted "to retire from the partnership, and so far as the law allows, from the business, and not to trade, act, or deal in any way, so as directly or indirectly to affect" the continuing partners. The business had been carried on in Wolverhampton and London. The action was brought by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex. Kekewich, J., had granted the injunction, but the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) reversed his decision, being of opinion that the covenant to retire from business, "so far as the law allows," was too vague for the court to enforce. The case is valuable for the exhaustive discussion of the principles on which covenants of this kind are upheld, and the changes in the doctrine of public policy in reference to this class of cases. Cotton, L.J., was of opinion that the old rule, that the law does not sanction an absolute covenant in restraint of trade, is still binding, but on this point the other judges refrain from giving any judicial opinion. The court was unanimous that the covenant not to trade or deal, so as to directly or indirectly affect the continuing partners was personal to the continuing partners, and could not be assigned, and in any case it would appear also too vague to be enforced by the court. A reference to the ancient case in 2 Hen. V. Pasch. Term, pl. 26, which Fry, L.J., calls the foundation of this branch of the law, is curious

as showing here how a little ebullition of temper on the part of Mr. Justice Hull, which has been enshrined by the reporter, has succeeded in rendering that worthy justice more remarkable than he would have been had he used less choleric language.

RESTRAINT OF BUSINESS—AGREEMENT NOT TO CARRY ON PROFESSION OF SURGEON—ACTING AS ASSISTANT.

Palmer v. *Mallett*, 36 Chy. D. 411, is another case on the law of agreements on restraint of trade. The defendant became assistant to Hall & Palmer, surgeons at Newtown, and entered into a bond to them conditioned that he should "not at any time hereafter directly or indirectly, and either alone or in partnership with, or as assistant to, any other person or persons, carry on the profession or business of a surgeon" at Newtown or within ten miles thereof. The bond contained a recital that the defendant had been taken into the employment of the obligees on the terms that "he should not any time set up or carry on the business of a surgeon" in Newtown or within ten miles thereof. The partnership was subsequently dissolved, and both Hall and Palmer continued to practice in Newtown, and Hall engaged the defendant as his assistant at a salary, whereupon Palmer brought the action to restrain the defendant from so acting. The action, as Chitty, J., observes, was not brought on the bond, but upon the agreement recited in the bond itself. The argument for the defence, however, appears to have been based on the supposition that the action was brought to enforce the bond, and it was contended on behalf of the defendant that as the bond was entered into with Hall & Palmer jointly, and for the protection of the joint business only, Palmer alone could not sue to enforce it, and, the joint business having come to an end, that the bond could no longer be enforced. But Chitty, J., decided that although the bond was joint, yet from a consideration of the terms of the agreement recited in the bond, it was intended that each partner should be protected thereby, and that the plaintiff had therefore an individual right to the relief he claimed, and this decision was affirmed by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.). Cotton, L.J., points out the distinction between covenants not to carry on a trade, and covenants not to carry on a profession. While the former are not broken by the covenantor becoming a clerk or assistant to another person who carries on the trade in question, the latter are broken by the covenantor acting as assistant to another person who practises the profession in question.

COSTS—TAXATION OF COSTS—SEPARATE DEFENCES.

The only point worth noticing in *Boswell* v. *Coaks*, 36 Chy. D. 444, is that where the House of Lords had, subject to certain directions, left it to the taxing officer to determine how many sets of costs should be allowed to defendants who had severed in their defences, it was held by North, J., and the Court of Appeal, that no appeal would lie from the ruling of the taxing officer on the point, unless he altogether omitted to exercise his discretion.

DOMICIL—ABANDONMENT OF DOMICIL OF CHOICE—REVIVAL OF DOMICIL OF ORIGIN.

The short point decided *In re Marrett, Chalmers* v. *Wingfield*, 36 Chy. D. 400, by Stirling, J., and the Court of Appeal was that, in order to lose a domicil of choice and revive the domicil of origin, it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently.

PRACTICE—SERVICE OUT OF JURISDICTION—CONTRACT TO BE PERFORMED WITHIN THE JURISDICTION—R. S. C., ORD. xl., R. 1.

In *Reynolds* v. *Coleman*, 36 Chy. D. 453, the plaintiff was an American resident in England for the purpose of his business, and the action was brought against the defendant, who was an American resident in America, to enforce a contract made in England to transfer to the plaintiff shares in an English company; and it was held by Kay, J., whose decision was affirmed by the Court of Appeal, that under ord. xl., r. 1, it is not necessary that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears from a consideration of the terms of the contract, and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction; and the contract in question was held to be one which, according to its terms and the position of the parties at the time it was made, ought to be performed within the jurisdiction.

RESTRAINT OF TRADE—RULE OF SOCIETY NOT TO EMPLOY SERVANTS OF OTHER MEMBERS —PUBLIC POLICY.

Mineral Water Bottle Exchange Society v. *Booth*, 36 Chy. D. 465. This was an action brought by a trade protection society to restrain one of its members from infringing a rule of the society whereby it was provided that no member should employ any traveller, carman, or outdoor employee who had left the service of another member, without the consent in writing of his late employer, till after the expiration of two years, and it was held by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), affirming the decision of Chitty, J., that the rule was an unreasonable restraint of trade, and therefore void.

WILL—CONSTRUCTION—"DIE WITHOUT LEAVING ISSUE."

In re Ball, Slattery v. *Ball*, 36 Chy. D. 508, is a case upon the construction of a will whereby the testator bequeathed personal estate in trust after the death of W. K. B. for W. R. B., and in case W. R. B. died without leaving issue male for J. B. W. R. B. died in the lifetime of W. K. B., having had only one son, who died an infant in his father's lifetime. It was contended on behalf of the next of kin of W. R. B. that the term "die without leaving issue" should be construed as meaning "die without having had issue," but North, J., held that the word "leaving" must be construed in its literal sense. The construction contended for, he held, could only be adopted "if the result of so doing is to make the whole instrument consistent, to make a gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift." He dissented from the case of *White* v. *Hight*, 12 Chy. D. 751.

ADMINISTRATION—COSTS—ASCERTAINING CLASS—TRUSTEE RELIEF ACT.

In re Gibbons' Will, 36 Chy. D. 486, it was held by Chitty, J., that executors, by payment into court under the Trustee Relief Act of a sum to answer a legacy to a class, cannot thereby relieve the general residue from bearing the costs of an inquiry to ascertain who are the persons entitled under the bequest.

Reviews and Notices of Books.

The History of Canada. By WILLIAM KINGSFORD. Toronto: Rowsell & Hutchinson. 1887.

It is the natural and laudable desire of every man to know what he can of the history of the land he lives in, and in the volume mentioned in the heading to this article, Mr. Kingsford undertakes to tell us the story of Canada under French rule, from its earliest date to 1682. We understand that his intention is to continue the work to the Union of Upper and Lower Canada in 1841, so as to comprise the history of our country under French rule, until the capitulation of the Marquis de Vaudreuil in 1760, and its cession to Great Britain by the Treaty of Paris in 1763; and thereafter under the Government of Great Britain and of the United Kingdom of Great Britain and Ireland.

Mr. Kingsford's qualifications for the work he has undertaken are the intense interest he takes in his subject, indefatigable industry, a perfect knowledge of the languages in which the documents from which his information is derived are written, and a familiarity with the archives of Canada, now under the charge of Mr. Brymner, to whose ability and courtesy Mr. Kingsford bears ample and deserved testimony in his work on the archæology of Canada,—and above all, a reputation and character which justify our full faith in the assurance he gives in his opening chapter: "That he will make every effort to be fair and honest," and in his confident hope "that those with whom he may have the misfortune to differ, will recognize that he has consulted original authorities, and that whatever opinions he expresses are not hastily or groundlessly formed; but that, on the contrary, he has warrant for the belief that they are fully sustained by evidence." With this assurance he enters upon the story of the occupation and colonization of Canada, and shows us that in Canada, as in the English colonies in North America, the work was commenced, not by the Government, but by private enterprise moved by the spirit of adventure and the hope of gain, aided after a while in Canada by the desire to extend the influence of the Church, and for the conversion of savage nations to Christianity; receiving later some official assistance by the incorporation of a company with means and influence and special powers of settlement and organization; and lastly, by the direct intervention of the Sovereign, and the assumption of the government of the country by France as a Royal possession. He then narrates in ordered sequence the three voyages of Cartier to the St. Lawrence, and his ascent of that river to Montreal, his attempt at settlement, and the sufferings he and his crew endured from the Canadian

climate in winter, his discouragement and return to France; the twelve voyages of Champlain, his discoveries and explorations of the great rivers and lakes, his skilful diplomacy in treating and dealing with the Indians, and finally his appointment as Governor-General of Canada; the conquest of Quebec by the English under Kirke, in 1629, its occupation by them for three years, and its restoration to France under the Treaty of St. Germaine-en-Laye.

He then places vividly before the reader the great events and actions of what Lord Lansdowne, on a late occasion at Montreal, rightly styled *the heroic age of Canada;*—the long, fierce struggle with the Indians, then a numerous and most formidable enemy;—the attacks upon the French settlements and posts by tribes coming often from very distant parts of the country, as the Mohawks from the country still bearing their name in Western New York; and the counter expeditions of the French against them to like distant places, through tracts of thickly wooded country, with only the Indian trail for guidance and without horses or carriages, or in canoes over lakes and rivers then recently discovered, and but little known;—their exploration of heretofore unknown lakes and rivers, from the St. Lawrence upward to Lake Superior, and of the country north of it to Hudson's Bay, and southward down the Illinois and Mississippi to the Gulf of Mexico; the hardships suffered in these daring expeditions and explorations, and the courage and perseverance displayed in overcoming them;—the victories and defeats, successes and disappointments, incident to these Indian wars;—the various modes and forms of government tried by the adventurers, by the Company of the Hundred Associates, or by the Council appointed by the Crown or Governor; the introduction of the Seigniorial system; the contests of the ecclesiastical and lay elements for supremacy, and especially on the burning question of the prohibition of the sale of liquor to the Indians, in which Frontenac and Bishop Laval took opposite sides, the Governor being the winner:—and, in a word, the cares, labours, trials and vicissitudes of fortune under which were laid the foundations of the land we now live in, and in the narration whereof Mr. Kingsford shows us "Quantæ molis erat *Canadensem* condere gentem." He intersperses in his narrative incidents of the history of France, and even of England, respecting religious and political events, and throwing light on Canadian history, and short sketches of the lives and characters of those who play part in his drama, and does full justice to the ability and firmness of Frontenac, the indomitable courage and perseverance of De La Salle and his fellow pioneers in discovery, De Tonty, Duluth, Jolliet and others; the ability and religious zeal of Bishop Laval, and the martyr spirit of the Recollets, Jesuits, and religious ladies;—but his hero is Champlain, whom he calls the True Founder of Canada, and whose character and deeds he paints in glowing terms. Indeed, we cannot give our readers a better idea of the spirit and style of Mr. Kingsford's book than by citing the following excerpts from his character of Champlain, which follow the narrative of his death, and the incidents immediately preceding it:

"There are few men whose characteristics can be more distinctly traced than those of Champlain; there are few characters which more satisfactorily sustain the examination bestowed on them. There is no moral leaven to weaken the

regard and esteem with which Champlain's character must be considered. It is seldom that we become acquainted with a life in which the pure, tranquil, constant advance of an individualism can be so fully traced. . . . . There is no character known to us in the British or French history of the American continent in modern days, which can advance higher claims to honourable fame. If I were to make a comparison between Champlain and any historic name which we possess, it would be with that of Julius Cæsar, with whose excellencies and genius he bears strong relationship, unalloyed by those vices and that social deformity which marked Roman life. Much of the brighter side of Cæsar's character is repeated in that of Champlain; his equanimity, his liberal opinions, his triumphs over difficulties and misfortunes, his modesty and ability in relating his actions, his high-bred stoicism. . . . . Both cultivated the elevating and consoling pursuits of literature. . . . . Judged by his writings Champlain comes before us with a rare modesty, and a careful observance of truth, so that his statements obtain immediate acceptance. A quiet humour runs through all he tells us. He does not sacrifice reality to effect. . . . . To him discovery was not merely sailing up the waters of a river and never penetrating beyond its shores. His genius was to advance to distant localities, to learn the resources of a country, its character, the extent of the population of the native tribes, and to study their manners and customs. He saw that the only means of gaining this end was by identifying himself with the Indians, with whom he entered into friendly relations. His discoveries were remarkable; he made known from personal examination the Ottawa, Lake Huron, Lake Ontario, the St. Lawrence, which he correctly describes, and Lake Champlain. He indeed traced out the southern portion of the Province of Ontario, without the precise minor details. . . . . No statue, no monument has been raised to Champlain's memory. No memorial exists to teach the youth of the Dominion what excellence there is in a noble, honest life, marked by devotion to duty, and an utter disregard of self. Canada has shown no honour to his name. It remained in modern days for Laval University to disseminate the true perpetuation of his genius in the record of his life and labours. It is a contribution never to pass away, and one by which Laval has established an enduring claim to consideration in the world-wide republic of letters. . . . . Champlain's name is imperishably written in the first and foremost pages of his country's history; it is the name of a man of genius, of pure and untarnished honour, the True Founder of Canada." (*See pp.* 131 to 141.) A captious critic might object to the comparison of Champlain to Julius Cæsar, and our substitution of *Canadensem* for *Romanam*, in Virgil's line,—but we must remember that, although not invested with the imperial purple, Champlain's were

"Hands that the rod of Empire might have swayed,"

and he would have made a better legislator than the monarch whom he served. No French-Canadian can be dissatisfied with the account the book gives of his ancestors, and no English-Canadian can refuse to acknowledge the merits of his French precursors. We trust both will like and patronize this work, and though

some may differ from opinions expressed in it, with which others may agree, none can charge it with wilful misstatement or unfair prejudice.

Mr. Kingsford's style is simple and clear. Some minor slips of the pen or press may be found by keen-eyed critics, but they can mislead no one. We think it would be well if the author had appended, or would append in a future volume, a brief account of the several Indian tribes and the tracts of country they inhabited, and of the religious orders which are prominent in his narrative. But, take it all in all, no book yet published in English seems to us to give so clear and detailed an account of the period of French government in Canada as the one before us; and, believing as we do, for the reasons we have stated, that its statements of fact are correct, we hold it to be a work which no student of Canadian history can afford to be without. It is well got up and printed, and the dates inserted at the head of each page of the events recorded in it, much facilitate its use.

G. W. WICKSTEED.

Notes on Exchanges and Legal Scrap Book.

POINTS IN CRIMINAL LAW DECIDED AT THE ANARCHISTS' TRIAL.—The *Criminal Law Magazine* devotes more than a hundred pages of its space in the November number to a report of the Anarchists' trial in the Supreme Court of Illinois. The chief questions of law of general interest decided in the case, *Spies et al.* v. *People*, are the following:—

If several persons combine to commit murder by concerted action, the acts and declarations of one of them, done in furtherance of the common design, are regarded by the law as the acts and declarations of all.

When several are jointly charged with murder, proof of a conspiracy may be given to show a common design to encourage the murder charged against the accused, and to establish the position of the members of the combination as accessories to the crime.

If A hire B to kill C at a certain place at a certain time, but he kill him at another place at the designated time, A is none the less guilty of aiding, abetting, advising and encouraging the death of C.

On a charge of conspiracy it is not necessary to prove that the conspirators came together and in terms agreed to take a design and pursue it by common means. It is sufficient to prove that they pursued, by their acts, the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of that same object.

A jury have a right to draw from proved circumstances such conclusions as are natural and reasonable.

Malice is always presumed where one person deliberately injures another.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all oppressors, and in the execution of their designs a murder is committed, all of the company are equally principals in the

murder, though at the time of the act one of them was at such a distance as to be out of view, if the murder is in furtherance of the common design.

Every person entering into a conspiracy on common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.

A combination of two or more persons, by concerted action, to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means, is a conspiracy.

One may become a partaker in a conspiracy by joining the others while it is being executed. As soon as the union of wills for the unlawful purpose is perfected the offence of conspiracy is complete.

He who influences people's minds and induces them by violent means to accomplish an illegal object, is himself a rioter, though he take no part in the riot.

Even though there be no special motive against the person slain, nor deliberate intention to hurt him, yet, if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who dealt the blow.

MURDER RESULTING FROM COMMON UNLAWFUL DESIGN.—The grand jury of Barbour county, Alabama, found a true bill against J. W., S. S., and five others, charging them with murdering M. C., by shooting him with a pistol. At the trial on December 4th, 1886, S. S. was sentenced to be hanged, and J. W. to the penitentiary for forty years. The evidence tended to show that the defendants conspired together to assault or beat deceased, and for that purpose repaired to his house in the night time, and that while some of the defendants were trying to take a gun from him, S. S. shot and killed him. During the happening of these events some of the defendants were watching at the gate, some were in the yard, and others in the house.

The Supreme Court of the State held that, if the defendants entered into a conspiracy to assault and beat, or kill the deceased, each is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences; and if, in pursuance of such common design, one of the defendants kills deceased, in his own house, and not in self-defence, the others being near at hand, all would be guilty of murder.—*Criminal Law Magazine.*

LARCENY.—From the same publication we learn that the Supreme Court of Alabama decided an appeal in which the main question was whether the acts admitted constituted a larceny. The defendants, farm labourers, who were hired to pick cotton at a certain price per hundred pounds, entered a cotton-house and removed some cotton with the intent to place it with some that they had picked, and which had not been weighed. The court held that this taking, being with the intent of depriving the owner of property, and placing it where the

taker could claim a lien on and hold it until certain false charges were paid, was larceny. The Chief Justice says: "We think deprivation of the ownership of property is one of the essentials of larceny. But is it necessary that the intent shall be to deprive the owner of the whole property taken? Is not the *animus furandi* as manifestly shown when the intent is simply to deprive him of a partial, though unsevered, interest in the property? There have been several decisions in which facts not distinguisbable, in legal or moral bearing, from those found in this record, have been pronounced larceny."

DEFINITION OF FRAUD.—A recent number of the *Law Quarterly Review* contains an elaborate discussion of the "Definition of Fraud," from the pen of Melville M. Biglow. This article is to be the first chapter of a work by its contributor on "Fraud." He states the grounds on which judges have sometimes declined to attempt a definition of fraud. These are chiefly the hopelessness of the undertaking, and the supposed danger attendant on circumscribing the limits within which fraudulent acts must lie. Definitions, however, have been attempted by the Roman laws by the dictionaries, by our judges, and by text writers. The author makes a distinction between a definition and a rule. To lay down a rule, limiting all frauds by it, would, he admits, be dangerous; but some clear and exact idea of fraud, such as a definition supplies, is necessary. The characteristic factor in fraud civiliter (the subject of this article) is either deception, touching motives; or it is circumvention, not touching motives. In the first form of the characteristic factor the parties are concerned together in some transaction; in its second form they are not. In either case general or particular rights may be affected. In the definition of fraud, its success or failure may be disregarded, for, though the courts generally refuse to take cognizance of fraud which comes to nothing, all the elements are present. Fraud may be said to consist in an endeavour to alter rights by deception touching motives, or by circumvention not touching motives. Such deception or circumvention may relate either to general or particular rights. We thus obtains four clauses of frauds, of each of which the author gives an illustration.

As an example of deception, touching motives and affecting general rights, we may take the action of a man who purchases my property on credit, not intending to pay me for it. He endeavours, by deception practised on my motives, to alter the right to my money. Again, if I am arrested on Sunday upon a trumped-up charge of crime, and held until Monday, for the purpose of arresting me on Monday on civil process, it is sought by circumvention (not practised on my motives) to alter one of my general rights, my right to liberty. The maker of a promissory note seeks to have me substitute for it another written agreement, apparently signed by the same surety as signed the note with him, on a false representation of the genuineness of the signature of the surety. He tries by deception, touching my motives, to alter one of my particular rights, the right to the benefit unimpaired of the obligation under which he and the surety are to me. Once more, when my debtor resolves not to pay me, and puts his property

out of his hands to prevent me from obtaining payment, he seeks by circumvention to alter a particular right of mine, the right to payment for the property sold.

The term "fraud upon the law" comes within the definition, and is used for convenience to designate a striking aspect of certain frauds. Every fraud must be against a person capable of rights; frauds "upon the law" are, like the rest, frauds upon an individual, a corporation, or the sovereign, generally in the evasion of some statute, such as the Bankrupt Acts, when the offence is nothing but fraud upon the creditors.

The writer discusses "constructive" fraud, a term loosely used, often denoting a contract obnoxious to public policy, and sometimes a synonym for actual fraud. The more legitimate use of the term is in the law of fiduciary relations. Here, however, it is only a case of legal suspicion or assumption of fraud. In this sense it does not fall within the definition. "Constructive" fraud is also applied, properly too, to the action of one who acquires a title with notice of its invalidity. The above definition is not wide enough, nor is it intended, to cover constructive fraud. The article discusses the assertion contained in the definition, that fraud can only be perpetrated upon rights, *i.e.*, upon legal rights. By representations which he knows to be false, A induces B to alter his will, already executed in favour of C, and to leave nothing to C. C cannot maintain an action against A for fraud, A having infringed no legal right of C.

In ordinary cases fraud is essentially active in nature, a feature which appears in the definition in the word endeavour. One may, however, endeavour by passive conduct to deceive another, and thus also be guilty of fraud. Some special duty may require him to speak; he cannot stand by and see his property sold by another as belonging to that other person, and then recover it from the purchaser. But he is not bound to take steps to protect a possible purchaser, of whose very existence he may be ignorant, from loss by the purchase of a note to which his name has been forged. When there is a duty to speak, silence would be misleading.

VOLUNTARY MAINTENANCE OF ANOTHER'S CHILDREN.—In the *Justice of the Peace* there is a somewhat full discussion of the law in reference to the right of a volunteer to recover, as against the parent, the amount which has been expended on his child for food, clothing and education. The cases cited in support of the contention that the father is not liable to one who provides for the child in the absence of any request or undertaking to pay on the part of the father are, *Law* v. *Wilkins*, 6 A. & E. 718; *Mortimore* v. *Wright*, 6 M. & W. 482; *Skelton* v. *Springett*, 11 C. B. 452. The conclusion arrived at from these cases is that, though the common law does not make the father liable, yet it may often be the case that the father does, by some letter or otherwise, undertake the payment of the son's debts. This is well illustrated in the case of *Andrews* v. *Garrett*, 6 C. B. N. S. 262, when a tailor seeks to compel the father to pay for clothes supplied to the son, the claim being based on an alleged promise of the father to pay half the debt. In *Knowlton* v. *Bluett*, L. R. 9 Ex. 307, the father of several illegitimate children made a verbal agreement with their mother (who

in law was only a stranger) to pay her £300 a year to keep the children. He, failing to keep his promise, the mother brought an action to recover arrears for two and a half years. The defence was that the agreement was not in writing, and was not to be performed within a year. The Exchequer Chamber held that it was intended to be performed immediately, and that it was only an accident that it might extend beyond the year, as it might be ended by due notice. Hence the Statute of Frauds did not apply.

The Journal of Jurisprudence and Scottish Law Magazine comes to us this year with promise of greater variety and interest, not only for its readers at home, but also for those on the Continent and in America. It seeks, as its name implies, to give prominence to the discussion of the fundamental principles of the science of Jurisprudence. To this end it undertakes to furnish, as a portion of its regular matter, discussions of the leading topics of the science by a number of the most eminent of the Continental jurists. The January number contains, among other very able articles, a scholarly paper on the Development of Right and the Right of Development, by Prof. Bluntschli, late of the University of Heidelberg, and another on Marriage in the German Middle Ages, by Dr. E. Friedberg, of the University of Berlin. Trial by Jury in Civil Causes, which is to be continued, will well repay perusal.

NUISANCES IN THE REPORTING ARENA.—We entirely agree with the *American Law Review* in the following obsevations on a practice occasionally indulged in by reporters and others:—"The late Judge Napton, of Missouri, is said to have detested the practice of referring to the parties in a judicial opinion as the appellant and respondent. The reason of his dislike of the practice is apparent to anyone. The mind is constantly on a troublesome search in reading the opinion where the parties are thus referred to, to ascertain and keep in view which party is appellant and respondent. This practice is still kept up in the opinions of the Supreme Courts of several of the states. . . . Another practice, scarcely less to be condemned, is that of several of the states, such as Illinois and Tennessee, in actions at law, where they reverse the names of the parties as they appear in the court below, and put the party appealing or prosecuting the writ of error as the plaintiff, although he may have stood in the court below as the defendant."

The *Central Law Journal* says on the same subject:—"We fully concur with our contemporary. In its best state the law has enough and to spare of conundrums, and it is simply cruel for its chosen ministers to burden the busy and hurried practitioner with puzzling problems of personal identity. It is the custom of courts, in their opinions, to avoid the use of patronymics; hence, a judge will often describe a party as 'the plaintiff in error here, defendant in the court below,' when he means simply 'Jones,' and if he really means Jones, we think he might say Jones without material derogation from his dignity."

Correspondence.

TO THE EDITOR OF THE LAW JOURNAL:

Sir,—It is a legal maxim that there is no wrong without a remedy. This seems satisfactory, but a correspondent thinks it is not applicable in all cases.

One of the statutory rules of the Post Office Savings Bank Department is, that where deposits are made by a trustee in the joint names of the trustee and the person on whose account the money is deposited, repayment will not be made "without the receipt or receipts of both the said parties or the survivor or survivors or the executor or administrator of such survivor." This sounds quite simple, but a Medo-Persian application of the rule works injustice, a correspondent thinks, under the following circumstances:—A gives B, in the presence of C, a sum of money to deposit for A in a Post Office Savings Bank. B, in making the deposit is asked for, and gives his name to the Post-master, who enters the deposit as having been made by B for A. A dies first; B then departs this life. A leaves a brother, one D, on whose behalf administration is obtained, there being other small assets. The administrator having possession of the pass book, and having filed his credentials, asks to have the deposits paid over to him, but is met by a quotation of the above rule, and is told that the money can be paid out only to B or to B's representatives. C, who was present when B was asked to make the deposit, was also present at the death of A, and the evidence is clear that there was no intention to constitute B a trustee, the money having merely been given to him because he happened to be going to the Post Office, and because A was leaving on a journey with C, and wanted to be saved the trouble of going with the deposit himself. B left no assets, and no one that can be found who will take out letters of administration for this trust estate. The parties are poor, and no possible way has been found by which the rule of the Department can be complied with. The Post Office authorities will pay the money to B's legal representatives, but not to A's. The fact is, B should have died first, the Department would then have been saved worry, and everything would have gone smoothly. There was once a robbery at Osgoode Hall; cash was taken out of the Chancery vault. A witty Chief Justice, whose common law prejudices were strong against everything pertaining to the equity side, was hugely tickled at this summary way of getting money out of court, and condoled with his Chancery brethren over the undue haste so different from the procedure of that leisurely court in those leisurely days. It would be highly improper to suggest any such course in the case I have referred to; but so long as the officials of the Department remain swathed in their red tape, I know of no other remedy. Yours,

LEX.

[The rule of the Department is, we fancy, a necessary one. There should, however, be some elasticity in the working of it. There should also be some discretion given to the judge on applications for administration enabling him to dispense with security in special cases.—ED. L. J.]

DIARY FOR FEBRUARY.

1. Wed....Sir Edw. Coke, born 1552. C. C. non-jury sittings in York. Barristers' Examination.
5. Sun.....*Sexagesima Sunday.* W. H. Draper, 2nd C. J. of C. P., 1856.
6. Mon....L. S. Hilary Term begins, H. C. J. sit. begin.
7. Tues....Maritime Court sits.
10. Fri.....Canada ceded to G. B., 1763. Union of Upper and Lower Canada, 1841.
11. Sat. ....T. Robertson appointed to Chy. Div., 1887.
12. Sun.....*Quinquagesima Sunday.*
15. Wed....Ash Wednesday.
16. Thur ...Chy. Div. H. C. J. sits. end.
18. Sat. ....L. S. Hilary Term ends. H. C. J. sits. end.
19. Sun.....*Quadragesima Sunday. 1st Sunday in Lent.*
21. Tues....Supreme Court of Canada sittings begin.
24. Fri.....St. Matthias.
26. Sun.....*2nd Sunday in Lent.*

Reports.

[REPORTED FOR THE CANADA LAW JOURNAL.]

STEVENSON *v.* MCHENERY.

Irregularity—Notice of motion—Premature hearing of motion—Defence filed after pleadings noted closed—Rule 596.

Where a notice of motion is given, returnable at a certain hour, "or so soon thereafter as the motion can be heard," it is irregular to bring the motion on to be heard at an earlier hour, even though the court may have appointed such earlier hour for its sittings.

Two days' notice of motion for judgment is sufficient. *Martens* v. *Birney*, 10 P. R. 368, approved.

When a defence is filed after the pleadings have been noted closed under Rule 596, it is a nullity.

[Boyd, C.—January 10, 1888.

Motion to set aside judgment for irregularity.

The defendant being in default of defence, the plaintiff duly filed a precipe with the proper officer, under Rule 596, requiring him to note that the pleadings were closed. Subsequently the defendant tendered, and the officer received and filed, a statement of defence, and, afterwards, on discovering that the pleadings had been closed, returned it to the defendant's solicitor.

The plaintiff, disregarding the defence, gave two days' notice of motion for judgment in default of defence, which notice was returnable on 7th December, at 11 a.m., "or so soon *thereafter* as the motion could be heard." On the 7th December, owing to the Divisional Court being in session, the court for the hearing of motions for judgment sat at 10 a. m., of which public notice was given by the Registrar. The motion came on and was disposed of at 10 a.m. The defendant's counsel was ignorant of the change in the hour of holding the court, and attended at 11 a. m., when he found the motion had been disposed of.

Nelson, for defendant, now moved to set aside the judgment for irregularity, on the ground that the notice should have been a seven days' notice under Chy. Ord. 418; and that the motion had been heard prematurely and before the notice of motion was returnable; and also on the ground that the motion for judgment in default of defence could not properly be made, a statement of defence having been filed, and the Clerk of Records and Writs having no right to take it off the files.

Hoyles, for the plaintiff. The two days' notice of motion was sufficient, *Martens* v. *Birney*, 10 P. R. 368. The filing of a statement of defence after the note had been entered under Rule 596, was a nullity. The defendant was bound to take notice of the change in the time of holding the court.

The CHANCELLOR.—The plaintiff might have avoided the difficulty which has arisen by given notice returnable at the time named, "or at such other hour as the court may on that day sit"—owing to the form in which the notice was given, the motion appears to have been heard prematurely. But the defendant was no doubt then in default of defence, and if he had appeared he could only have obtained relief by an appeal to the indulgence of the court. This fact is entitled to weight in disposing of the costs. The judgment must be set aside, and the defendant allowed to defend, but the plaintiff's costs of noting the pleadings closed, and of the motion for judgment, and of this motion, must be costs in the cause to him in any event. The two days' notice of motion for judgment was sufficient.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

THE CONFEDERATION LIFE ASSOCIATION *v.* MILLER.

Life insurance—Application for policy—Declaration by assured—Basis of contract—Warranty—Misdirection.

An application for a life insurance policy contained the following declaration after the applicant's answer to the question submitted:

"I, the said George Miller (the person whose life is to be insured), do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read, or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said Association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the Association, during my lifetime and good health. I (the party in whose favour the assurance is granted), do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said Association."

Held, (affirming the judgment of the court below) that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief;" and though some of the answers were untrue in fact, the policy was not thereby avoided unless they were wilfully untrue.

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant their verdict should be for the plaintiffs.

Held, a proper direction.

Appeal dismissed with costs.

S. H. Blake, Q.C., and *Beatty*, Q.C., for appellants.

Dr. McMichael, Q.C., and *McCarthy*, Q.C., for respondents.

COX & WORTS *v.* SUTHERLAND.

Principal and agent—Speculating in stocks—Instructions to broker—Broker's duty—Money paid for margins.

S., a speculator in stocks, instructed F., a stock-broker, to purchase for him a certain number of shares in F. B. stock, expecting to make a profit out of a rise in the value of said stock in the market.

Held, affirming the judgment of the Court below, that the relation between S. and F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would then be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.

F. being about to retire from business as a stock-broker, handed over his stock transactions, including that with S., to C., to which S. consented. C. acknowleged to S. having received from F. the amount paid for margins on the stock which F. was instructed to buy, neither F. nor C. having purchased the stock and set it apart as the property of S.

Held, affirming the judgment of the Court below, that C. was liable, in an action for money had and received, to refund to S. the amount so paid for margins.

Appeal dismissed with costs.

W. Cassels, Q.C., and *Cox*, for the appellants.

Thompson, for the respondents.

GARLAND *v.* GEMMILL.

Copyright — Infringement of by making extracts—Form of notice on title page—Copies deposited with the Minister of Agriculture.

A copyrighted work called "The Canadian Parliamentary Companion," contained biographical sketches of M.P's and others which the author had procured from the subjects for the purpose of his book. G. in preparing a similar work to be called "The Parliamentary Directory and Statistical Guide," sent circulars to a number of public men asking for short biographical sketches and was, by many of them, referred to the first-mentioned work and took such sketches therefrom.

Held, that this was an infringement by G. of the copyright in "The Canadian Parliamentary Companion," and G. was properly enjoined from publishing or selling the books containing such extracted matter.

By 38 Vict. c. 88, s. 9, a notice must be inserted in the title page or page following of every copy of a book copyrighted thereunder in the form following:—"Entered according to the Act of the Parliament of Canada in the

year ——, by A. B., in the office of the Minister of Agriculture."

Held, that the omission of the words "of Canada" in such form did not avoid the copyright, but was a sufficient compliance with the Act.

Held, also, that depositing copies of a book containing the said notice in the office of the Minister of Agriculture before the copyright has been obtained does not invalidate it after it has been granted.

Appeal dismissed with costs.

W. Cassels, Q.C., and *Walker* for the appellant.

F. Arnoldi for respondent.

BEAUDET *v.* NORTH SHORE RAILWAY CO.

43 & 44 Vict. c. 43, s. 9 (P.Q.)—Award—Validity of—Faits and Articles—Art 225, C. C. P.

E. B., *et al.*, joint owners of land situate in the City of Quebec, were awarded $11,900 under 43 & 44 Vict. c. 43, s. 9, for a portion of said land expropriated for the use of the North Shore Railway Company.

On the 12th March, 1885, E. B., *et al.*, instituted an action against the N. S. R. C., based on the award. The Company not having pleaded, foreclosure was granted, and on 21st April process for interrogatories upon *faits* and *articles*, was issued and returned on the 26th April. The Company made default. On 18th June, the *faits* and *articles* were delared taken *pro confessis*. On 16th May, E.B., *et al.*, consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence.

On September 2, E. B., *et al.* inscribed the case for hearing on the merits, on which day the Railway Company moved to be authorized to answer the *faits* and *articles*, and the motion was refused. The notice of expropriation and the award both described the land expropriated as No. 1 on the plan of the Railway Company deposited according to law, but in another part of the notice it described it as forming part of the cadastral lot 2,345, and in the award as forming part of lots 2,344-345. On the 5th December, judgment was rendered in favor of E. B., *et al.* for the amount of the award. From this judgment the Railway Company appealed to the Court of Queen's Bench, (Appeal Side), and that Court reversed the judgment of the Superior Court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court to allow the defendants to answer the *faits* and *articles*.

On appeal to the Supreme Court of Canada it was

Held, (1) That there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated, and which was valued by the arbitrators.

Held, (2) That the motion for leave to answer *faits* and *articles* was properly refused. TASCHEREAU, J. dissenting.

Appeal allowed with costs.

Duhamel, Q.C., for the appellants.

Bedard, for respondents.

MACKINNON *v.* KEROACK.

Capias—Petition to be discharged—Judgment on—Final judgment appealable under s. 28, c. 135 R. S. C.—Arts. 819, 821, C. C. P.—Fraudulent preference—Secreting—Art. 798, C. C. P.—Promissory note discounted—Arts. 1036, 1953, C. C. (P.Q.).

A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P.Q.), he petitioned to be discharged under art. 819, C. C. P., and issue having been joined on the pleadings under art. 820, C. C. P. the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (Appeal side), and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction.

Held (TASCHEREAU, J., dissenting), that the judgment was a final judgment in a judicial proceeding within the meaning of s. 28, c. 135, R. S. C., and therefore appealable.

On the merits it was held per RITCHIE, C. J., and FOURNIER and TASCHEREAU, JJ., that

fraudulent preference to one or more creditors is a secretion within the meaning of art. 798, C. C. P.

Also that an endorser of a note discounted by a bank has the right, under art. 1953, C.C., to avail himself of the remedy provided by art. 798, C. C. P., if the maker fraudulently disposes of his property.

STRONG, HENRY, and GWYNNE, JJ., contra; *Gault* v. *Dussault*, 4 Leg. News 321, approved.

The court being equally divided, the appeal was dismissed without costs.

Macmaster, Q.C., and *Hutchinson*, for appellant.

Geoffrion, Q.C., and *Greenshields*, for respondent.

NORTH SHORE RAILWAY CO. *v.* TRUDEL.

Land, sale of—Delivery to agent—Pleading—Arts. 1501, 1502 *C. C.*

S. T. brought an action to recover $3,200 as balance of the purchase money of certain lands in Quebec sold by him to the N. S. R. Co. To this action the railway company pleaded by temporary exception that out of 3307 superficial feet sold to them, S. T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. To this plea S. T. replied specially that he delivered all the land sold to P. B. V., the agent of the company, with their assent and approbation, together with other land sold to said P. B. V. at the same time. At the trial it was shown that P. B. V. had purchased all the lands owned by S. T. in that locality but exacted two deeds of sale, one of 3307 feet for the Railway company, and another of the balance of the property for himself. By the deed to P. B. V. his land is bounded by that previously sold to the company. P. B. V. took possession, and the railway company fenced in what they required.

Held, affirming the judgments of the Court below, that S. T. having delivered to P. B. V., the agent of the company, with their assent and approbation, the whole of the land sold to them, together with other lands sold to the said P. B. V., at the same time, he was entitled to the balance of the purchase money.

Per Taschereau, J., that all appellants could claim was a diminution of price, or a realization of the sale under Arts. 1501, 1502, and that therefore their plea was bad.

Appeal dismissed with costs.

Duhamel, Q.C., for appellants.

Bedard, for respondent.

SHELBURNE ELECTION CASE.

ROBERTSON *v.* LAURIE.

Election petition—Service of copy—Extension of time—Discretion of judge—R. S. C. c. 9, *s.* 10.

Held, that an order extending time for service of the notice of the presentation of an election petition with a copy of the petition from five days to fifteen days by a judge in Nova Scotia, on the ground that the respondent was at the time at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of c. 9 R. S. C.

Appeal dismissed with costs.

R. Scott, Q.C., for appellant.

Graham, Q.C., for respondent.

PRINCE CO. (P.E.I.) ELECTION CASE.

EDWARD HACKETT (Petitioner in the Court below) Appellant, and STANISLAUS FRANCIS PERRY (Respondent in the Court below) Respondent.

*Legislative Assembly—Disqualification—Enjoying and holding an interest under a contract with the Crown, what constitutes—*39 *Vict. c.* 3, *s.* 4 *and* 8 *(P.E.I.).*

The return of S. P. as member-elect for the House of Commons for the Electoral District of Prince County, P. E. I., was contested on the ground that S. P. being a member of the Provincial House of Assembly, he was not eligible as a member of the House of Commons. At the trial it was admitted that S. P. had been elected to the Provincial House of Assembly at the general election in June, 1886, and that there had been no meeting of the local house at the date of the general election for the Dominion House. S. P. prior to his nomination gave to two members of the House of Assembly a written resignation of his seat, and at the time of the general election for the House of Commons

S. P. had acquired for value, and was holding a share in a ferry contract with the Local Government, subsidized to the extent of $95 per annum.

The Judge at the trial held that S. P. had not properly resigned his seat, as the Island Statute 39 Vict. c. 3, had not provided for the resignation of a member in the interval between the dissolution of one general assembly the first session of the next general assembly, but held that his seat had become vacant under the provisions of the 4th section of the Provincial Act, 39 Vict. c. 3 (P. E. I.).

On appeal to the Supreme Court of Canada,

Held, affirmative of the court below. TASCHEREAU, J., dissenting, that S. P. enjoyed and held such an interest in a public contract as rendered his seat vacant in the local House of Assembly (P. E. I.) under sections 4 and 8, 39 Vict. c. 3 (P. E. I.), and therefore that he was properly eligible to the House of Commons.

Appeal dismissed with costs.

Hodgson, Q.C., for appellant.

Peters, for respondent.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (Appellant) *v.* THE ATTORNEY-GENERAL OF CANADA (Respondent).

B. N. A. Act s. 92 ss. 5, 109 and 146—47 Vict. c. 14, s. 2 (B.C.)—Provincial public lands, transfer of, to the Dominion of Canada—Effect of—Precious metals vested in the Crown in right of the Dominion Government.

Appeal from the Exchequer Court of Canada.

By section 2 of the Order in Council, passed in virtue of section 146 of the B. N. A. Act, under which British Columbia was admitted into the Union it was provided as follows:

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and the Province of Manitoba."

By 47 Vict. c. 14, s. 2 (B. C.) it was enacted as follows:

"From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 2, admitting the Province of British Columbia into Confederation."

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent and without argument, gave judgment in favor of the Dominion Government.

On appeal to the Supreme Court,

Held, affirming the judgment of the Exchequer Court, FOURNIER and HENRY, JJ., dissenting, that the Order in Council admitting British Columbia into Confederation and the statutes transferring the public lands described therein, the precious metals in, upon and under such public lands, are now vested in the Crown as represented by the Dominion Government.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Burbidge Q.C., and *Hogg* for respondent.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR CANADA (Appellant) AND A. S. FARWELL (Respondent).

47 Vict. c. 14 s. 2 (B.C.), Effect of—Provincial Crown grant void.

Appeal from the Exchequer Court of Canada.

By provision 2 of the Order in Council admitting the Province of British Columbia into Confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the Governments of Canada

and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th Dec., 1883, the Legislature of British Columbia passed the Statute 47 Vict. c. 14, by which it was enacted *inter alia* as follows: "From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing, and to aid in the construction of, the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the Order in Council, section 2, admitting the Province of British Columbia into Confederation. On the 20th Nov., 1883, by public notice, the Government of British Columbia, reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, to comply with the provisions of the Provincial Statutes, a survey of a certain parcel of land situate within the said belt of twenty miles was filed, and the survey having been finally accepted on the 13th January, 1885, Letters Patent under the Great Seal of the Province, were issued to F. for the land in question. The Attorney-General of Canada, by information of intrusion, sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Exchequer Court, HENRY, J., dissenting, that at the date of the grant, the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada.

Per STRONG, J., That the appellant should be ordered, if insisted upon by respondent, to file the affidavit of the Chief Engineer of the Canadian Pacific Railway to prove that at the date of the grant the line of the Canadian Pacific Railway had been located within twenty miles of the land in question.

Appeal allowed with costs.

J. S. D. Thompson, *Burbidge*, Q.C., and *Hogg*, for appellant.

T. Davie, for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Re BOYLAN AND THE CITY OF TORONTO.

Tavern License — License Commissioners — Municipal By-law.

Held, (1) That the Council of the Corporation of the City of Toronto has the power under R. S. O. c. 181, s. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law (39 Vic. c. 26), granting limiting powers to the Board of License Commissioners.

Held, (2) That though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the Council of the City and could have had no operation elsewhere than in the City, shewed that it must by reasonable intendment be held operative there.

Held, (3) That the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the Legislature to the City to pass the same.

O'Donohoe, for motion.

McWilliams, contra.

GORDON *v.* CITY OF BELLEVILLE.

Municipal Corporation—Liability for injury caused by ice on sidewalk—Knowledge—Contributory negligence.

The plaintiff, a resident of Belleville, in going to and from the main part of the city, to and from his residence, usually used a part of Queen Street, west of George Street, and which was bounded on the west by the school lot, forming a *cul de sac*. Foot passengers were in the habit of walking through the school lot as a short cut, and going across it they would come unto and walk over this portion of Queen Street.

The municipality had laid down a plank

sidewalk about five feet wide on the south side of Queen Street, from the west side of George Street to the school lot. Overhanging about half of this walk was the projecting eave or roof of a cottage, the drippings from which formed a ridge of ice on the centre of the walk. Plaintiff knew the walk was dangerous —he passed and saw it every day; that portion of the street was not used for vehicles, and there was a travelled path through the snow to the north of the sidewalk. Plaintiff going home on a moonlight night used the sidewalk, slipped, fell, and injured his arm. Defendants contended he should have been non-suited, because he showed himself to have been guilty of contributory negligence.

Held, that the plaintiff having the right to use the sidewalk, it was a question for the jury whether, under the circumstances, he was exercising reasonable care, and that mere knowledge does not constitute contributory negligence.

Chancery Division.

Full Court.] [Dec. 21, 1887.

CHRYSLER *v.* TOWNSHIP OF SARNIA.

Drainage—Municipal corporation—Action for damages—Notice in writing—R. S. O. c. 33, s. 30, ss. 3.—47 Vict. c. 8 (O.).

Held, affirming the decison of Rose, J., that the proper construction of the Ontario Drainage Act, R. S. O. c. 33, s. 30, ss. 3, is that as a prerequisite to the maintenance of an action for damages arising from neglect to repair, there should be a reasonable notice in writing given by the plaintiff to the municipality alleged to be in default. This is not confined to the remedy by mandamus. It is intended to be for a safeguard to the municipality so as not to expose them to litigation before their attention has been called to that which is specially within the cognizance of the individual complaining. The repeal of ss. 3, and its re-enactment in 47 Vict. c. 8 (O.), makes it, if possible, more plain that a written notice should be given before the court is resorted to.

Lash, Q.C., for the plaintiff.

Wallace Nesbitt, for the defendants.

Full Court.] [Dec. 5, 1887.

SEIFFERT *v.* IRVING.

Partnership—Goods supplied to inchoate company—Liability.

Where a number of persons signed a certificate under R. S. O. c. 158, contemplating forming themselves into a co-operative association, but did not complete the necessary preliminaries and secure actual incorporation, and certain goods were furnished to them in good faith by the plaintiff.

Held, affirming the judgment of Boyd, C., in an action for the price of the goods against certain of them, that the plaintiff was entitled to recover, for that the defendants were engaged in a trading concern, and with their associates formed a partnership. They were not a company, having failed to fulfil the preliminary requirements to incorporation, and therefore they were a partnership.

Moss, Q.C., for the plantiff.

Lash, Q.C., for the defendants.

Falconbridge, J.] [Jan. 9, 1888.

STORY *v.* MCKAY.

Bill of exchange drawn in one country and payable in another—Law governing legality of consideration.

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The defendant was at the time a domiciled Canadian of Ontario, and the firm of Toronto merchants were also domiciled Canadians. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as such, it was under the law of New York, an illegal contract and invalid.

Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario.

A. H. F. Lefroy, for the plaintiffs.

James Pearson, for the defendant.

Practice.

Boyd, C.] [Dec. 14, 1887.

STRANGE *v.* RADFORD.

Mortgage suit—Property in Manitoba—Sale or Foreclosure.

In a mortgage suit in the usual form for sale, for delivery of possession, and relief under the covenant in the mortgage, where the defendant resided in Ontario, but the mortgaged premises were in Manitoba.

Held, that the mortgagor could be foreclosed, because such a decree acts upon the person and not upon the land directly, but that any extension of this doctrine, such as putting the machinery of the court in motion to effect a sale of land in another province, would be a mischievous novelty. If the defendant refused to execute the conveyance on sale, title would not pass to the purchaser by a vesting order. To carry out a sale it is essential that the court should have territorial jurisdiction over the land.

It is not the course of the court to pronounce inoperative judgments. The plaintiff may have a foreclosure, or, he may, for a sale, go to the courts in Manitoba.

T. Langton, for the plaintiff.

C. P. Divisional Court.] [Dec. 23, 1887.

WELLBANK *v.* CONGER.

Judgment—"The court"—Trial judge—Divisional Court—High Court of Justice—Rules 315, 321.

The court may, upon motion, enter judgment upon the verdict given at the trial, where the trial judge has not done so.

Quære, whether such motion should be to the Divisional Court?

"The court," in rules 315, 321, means the High Court of Justice; whether as distinguished from its divisions or not.

It was directed that an order for judgment should be drawn up in the High Court before the three judges who composed the Divisional Court of the Common Pleas Division, as judges of the High Court.

Ritchie, Q.C., for the plaintiff.

W. H. P. Clement for the defendant.

Boyd, C.] [Jan. 12, 1888.

ARMSTRONG *v.* DOUGLAS, *et al.*

Assignment of debt—Garnishment after assignment—R. S. O. c. 116, *s.* 7—*Res judicata—Demurrer.*

A recovered a judgment against B, and B assigned to him an alleged debt due B by D. A then, in the suit of A *v.* B, took garnishee proceedings against D. The attaching order and garnishee summons were made by one County Judge returnable before another, and were subseqently discharged with costs. A then, as assignee of B, brought this action, and D, among other defences, set up the garnishee proceedings as *res judicata*.

To this defence plaintiff demurred, the principal ground of demurrer being that no jurisdiction was shown in the inferior or County Court.

Held, that even if jurisdiction was assumed, it did not appear that the disposition of the garnishee proceedings in defendant's favour was on the merits.

The assignment of the debt from the intended garnishee to the judgment debtor having been perfected to the judgment creditor, there was no longer a third party in the transaction, the debtor was directly liable to the assignee of the original creditor, as provided by R. S. O. c. 116, s. 7, the debt thus assigned was no longer within the purview of the debt attachment or garnishment clauses. A debt *bona fide* assigned by the judgment debtor before attachment cannot be garnished.

Demurrer allowed, and leave to amend given.

G. C. Campbell, for the demurrer.

H. J. Scott, Q.C., contra.

Miscellaneous.

SHEET ALMANAC, 1888.—By some mistake some changes in the "Canadian Judiciary," which should have been noted in our sheet almanac for this year, were not inserted George Wheeloch Burbidge, Q.C., formerly Deputy Minister of Justice, should appear as Judge of the Exchequer Court, under the Act of 50-51 Vict.; and Mr. L. A. Audette, as Registrar.

Mr. Augustus Power, Q.C., is acting Deputy Minister of Justice in room of Mr. Burbidge.

Law Society of Upper Canada.

MICHAELMAS TERM.

The following gentlemen were called to the Bar during Michaelmas Term, 1887, viz:—*Nov. 21st*—George Watson Holmes, Herbert Langell Dunn, Roderick James Maclennan, James Albert Page, Francis Foley Lemieux, Edward Holton Britton, Alexander Robert Bartlet, Robert James Leslie, Herbert Hartley Dewart, Robert Cleugh LeVésconte, D'Arcy de Lessert Grierson, William John Millican, George Filmore Cane, Horace Osmond Ernest Pratt, Richard Alexander Bayley. *November 22nd*—Abner James Arnold, William Percy Torrance. *November 26th*—William Arthur John Bell.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz:—*November 21st*—E. H. Britton, R. C. Le Vésconte, R. J. Maclennan, G. F. Cane, R. A. Bayley, G. R. O'Rielly, E. S. Wigle, E. A. Crease, A. F. May, G. J. Leggatt, R. H. Dignan, J. H. A. Beattie, E. Considine, A. D. McLaren, H. N. Roberts, H. Macbeth. *November 22nd*—A. Stevenson. *November 26th*—J. C. Grant, A. R. Bartlet, R. J. Leslie, G. W. Holmes, W. D. Gregory, W. A. J. Bell, G. A. Payne, J. P. Lawless, J. Y. Murdoch. *December 2nd*—W. P. Torrance, J. M. Quinn. *December 10th*—C. E. Weeks.

The following gentlemen passed the First Intermediate Examination, viz:—J. F. Orde, with honours and first scholarship; C. E. Burkholder, with honours and second scholarship; W. H. Hunter, with honours and third scholarship; A. Constantineau, with honours; and Messrs. J. Ross, D. Hooey, R. A. Widdowson, E. S. B. Cronyn, J. Webster, A. C. Sutton, M. Routhier, W. L. Morton, T. W. Horn, A. J. J. Thibodo, H. A. Simpson, A. H. Wallbridge, W. A. Smith, A. B. McCallum, J. F. O'Brien, C. Elliott, J. H. Hegler, J. Miller, H. W. Macoomb, W. P. McMahon, J. A. Ritchie, M. Scandrett, W. C. Smith.

The following gentlemen passed the Second Intermediate Examination, viz:—J. A. V. Preston, with honours and first scholarship; A. Collins, with honours and second scholarship; C. D. Scott, with honours and third scholarship; and Messrs. F. W. Carey, G. C. Gunn, W. E. Tisdale, R. G. Smyth, H. Harvey, R. L. Elliott, J. H. Hunter, R. M. Macdonald, C. McIntosh, J. F. Edgar, R. M. Thompson, J. F. Woodworth, C. A. Ghent, S. D. Lazier, W. G. Burns, H. Miller.

The following candidates were admitted as Students-at-law, viz:—*Graduates*—F. J. Fulton, J. J. Maclennan, T. B. Gash, J. McEwen, T. D. Law, J. F. Carmichael, C. B. Dupuis, W. Davis. *Matriculants*—A. E. Scanlon, H. T. Berry, J. E. Bird, W. J. Boland, W. I. Dick, W. Farnham, J. F. Jeffery, M. P. McDonagh, J. A. Oliver, R. S. Robertson, W. F. Scott, J. G. Shaw. *Juniors*—H. G. Hamilton, D. E. Stuart, G. A. Kingston, H. F. Gault, A. L. Malone, H. M. McConnell, J. F. McMaster, H. E. A. Robertson, T. H. Lloyd, T. W. McGarry, E. Harley, L. B. C. Livingstone, T. B. Martin. *Articled Clerk*—W. J. McCamon.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM

For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 / 1890 } Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. FEBRUARY 15, 1888. NO. 3.

WE have received an answer to the article of F. C. W. on "The Legal Aspect of Disallowance in Old Manitoba," which, however, must stand over till next number.

A RECENT number of the *Law Reports* contains a complete list of the Judges and Law Officers of the Crown who have held office in England for the last twenty-two years. These memoranda of the English judiciary are hereafter to be continued annually in the *Law Reports.*

THE second annual meeting of the County of York Law Association was held at Osgoode Hall on Monday, the 6th day of February. We have received a full report of the meeting, but it was unavoidably too late for this number. We shall have the pleasure of laying it before our readers in the next issue. We may say, however, that the affairs of the Association are in a flourishing condition, and that it is doing valuable work in the interests of the profession and public.

THERE is one commendable thing, says *The American Law Register*, about the deluge of reports which the profession is now suffering from. It will open the eyes of many to the evil of citing every case on a given subject, either in a brief, an opinion, or a legal essay. It may also prevent this kind of citation by furnishing such a mass of possible citations that no man could possibly gather them together. And so we will all come round again to the good old practice of citing our law, *pondere non numero*, which may be freely translated by "leading cases, not the contents of the latest digest."

BY chapter 16 of 50-51 Vict., as our readers are aware, some important changes were made in the *personnel* and jurisdiction of the Exchequer Court. The Supreme Court Judges and Registrar were relieved from all Exchequer work, and provision was made for the appointment of a special judge and special registrar and other officers. George Wheelock Burbidge, Q.C., the Deputy Minister of Justice, was appointed Judge of the Exchequer Court on 1st October, 1887, and was gazetted the same day, and Mr. Louis Arthur Audette, of the City of Quebec, advocate, was appointed Registrar of the Court on the 8th November, 1887. No other appointments in connection with the court have yet been made. Mr. Augustus Power, Q.C., of the Department of Justice, has been acting Deputy-Minister since Mr. Burbidge's appointment as Judge.

INTEREST AFTER DEFAULT.

THE Court of Appeal in affirming the decision of Proudfoot, J., in *Powell* v. *Peck*, 12 O. R., 492, 22 C. L. J. 386, do not appear to have laid down any hard and fast rule, that in no case can interest be recovered at a higher rate than six per cent. under a mortgage, for the detention of the principal beyond the day appointed for payment On the contrary, they appear merely to have proceeded on the well-settled rule, that such interest is, in the absence of any express contract between the parties providing for payment of interest after default, merely recoverable as damages for breach of the covenant to pay at the day named, and that the amount of these damages is discretionary with the jury, or the judge who may be discharging the function of a jury. As to which rule we would remark, *en passant*, that it is a venerable relic which should as soon as possible be relegated to some lumber room that contains many like fusty remains of antiquity.

The case before the Court of Appeal was therefore in substance an appeal from the discretion of the court below, and, acting upon the well understood rule governing appellate courts, that where the appeal is from a matter within the discretion of the judge appealed from, it is incumbent on the appellant to show either that there has been a gross miscarriage of justice, or that the order appealed from is clearly wrong, the court refused to disturb the order appealed from, because the appellant could fulfil neither condition. We believe it will be found, however, that this decision is no obstacle to a judge or jury awarding damages at a higher rate than six per cent. for the detention of money wherever evidence is given to warrant it. It would seem, however, that in the opinion of the Court of Appeal, the rule laid down by Blake, V.C., in *Simonton* v. *Graham*, 8 P. R. 495, is not correct. In that case it was held that *prima facie* damages after default should be allowed at the mortgage rate, but that the person seeking to reduce it might show that such rate was excessive and more than the value of money. This certainly was the reasonable and common-sense rule, and we regret it has not been followed. The judgment of the Court of Appeal appears to throw on the party seeking to recover more than six per cent. the onus of showing that such increased rate is the proper value of money. The evidence pertinent to such an inquiry would appear not to be properly limited to establishing the general value of money in the market, but rather the value of money lent upon security of the kind upon which the money in default is invested. The character of the security is always an important ingredient in determining the rate of interest upon loans, and by detaining the money beyond the time fixed for repayment, the covenantor, in effect, is compelling the covenantee against his will to lend the money for the period during which it is detained, and the security for the money during such detention is often no better, and may be much worse than it was when the original loan was made. The parties certainly ought to be the best judges of their own business as to the rate of interest that should be paid, and it is not desirable that the court should in effect step in and make a new bargain for them. In so far as the view taken by the Court of Appeal tends in this direction, we think the tendency is wrong. The sooner the Legislature puts the law in the way it is supposed to be by laymen, and as it reasonably should be, the better.

REPORTS AND REPORTERS.

IT is stated, I believe, on good authority, that, at the present time, the different Anglo-Saxon communities are producing about six hundred volumes of Law Reports per annum. Ontario, seemingly, has produced her full quota, and apparently the most modest of all the communities is the Mother Country.

The reports of the courts of this Province at the present time, number some five volumes per annum, and, taking into consideration that part of the business of the Supreme Court which relates to litigation from Ontario, the number of reports per annum in respect to the litigation of this Province would be fully six volumes. England, containing as she does, a population of more than ten times that of Ontario and possessing a wealth, with all the manifold causes of litigation which it involves, probably one hundred-fold in excess of the wealth of this Province, issues (aside from Admiralty, Probate, and Crown Cases) but six volumes of reports a year, and one volume of these reports is about half taken up with reports of decisions upon cases from the Colonies. In other words, the yearly number of volumes of the Law Reports of this Province at the present time is equal to those of England, whilst there are more than twice as many cases in the latter. It is obvious that this should not be: either the cases that are reported are too much padded, or many cases are reported which should not be.

I believe that both these evils exist, and have for some years past been increasing. Even in England there is a considerable under-current of feeling amongst the profession that the present reporters are not as efficient as reporters were many years ago, and that existing reports fail in conciseness and in an exact statement of the facts and law to be reported. The same evils exist here in a more aggravated form. The amendment of this is entirely in the hands of the profession, and it is solely on behalf of the profession that I allude to the matter.

I think that two or three volumes a year should be a sufficient number of reports to be issued by the Law Society of this Province. As I understand the matter, no case should be reported in which the decision turns merely on facts, and involves no question of law, unless in a court of last resort, and even then briefly. I further incline to the opinion that cases which involve the construction of documents, including wills, should rarely be reported, and never unless they illustrate or establish some principle of law or canon of construction. Facts should be stated as found. The proper office of a reporter is to record judicial decisions as to the law in reference to the facts so found. I think also that there should not, in general, be any reference to the pleadings, at all events as to their form. The arguments of counsel are often useful, if the case has been carefully prepared, pertinent authorities cited, and a sifting process carefully executed; and in such cases only should the arguments of counsel be reported.

Again, I think that oftentimes even the judgments themselves might be very much reduced in volume by eliminating those portions that are merely *obiter dicta*, or which, referring in detail to the facts of the case, are useless to the

reader, though of value to the litigant. I presume that our judges would gladly submit to a revision of their judgments as delivered if done in a proper and careful manner, at all events any such revision, if authorized, should be submitted to them before publication. A difficulty, however, occurs here, in that this would necessarily cause a delay which would be often inconvenient to the profession. This difficulty could only be met by the reporter and editor having plenary powers to cut and carve the judgments of the judges as might be necessary. These powers, if intelligently and carefully exercised, would be a boon to the profession and might possibly tend, not only to reduce the bulk of the reports, but also to induce more conciseness and definiteness in expression on the part of the judge.

An instance of the evil to which I refer is exemplified in the report of *Wells* v. *Northern Railway Company*, 14 O. R. 594. The learned judge in that case concludes (no doubt correctly) that as the easement or right claimed by the plaintiff was enjoyed from the time of the conveyance of the right of way in question to the defendants, the conveyance being lost, it might be assumed that the deed contained the easement or reservation that had been so enjoyed by the different owners of the property from the date of the conveyance. The learned judge then adds, "or he is entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as a right." The judge, no doubt, was well aware of the fact that a grant of an easement cannot be presumed from use for twenty years only, where, owing to there being an incapacity to grant, such grant would, if made, have been invalid (see *Mills* v. *New Forest Commissioners*, 18 C. B. 60, and *Rochdale Canal Company* v. *Ratcliffe*, 18 Q. B. 287), and may have assumed (contrary, however, to the fact) that in this case there had been a user for the longer period of forty years, by means of which the title of the plaintiff under the Prescription Act to the easement in question would have been good. This *obiter dictum*, apparently based on an erroneous view of the facts, was not necessary for the decision of the case, and should not have been reported.

Again, take the case of *Beam* v. *Merner* (*Ib.* 412). Here we find no less than eleven pages taken up with the head note, statement of facts, statement of the pleadings, and the arguments of counsel. To enable the profession to understand what the facts were, and the points in dispute, this could have been done in two pages, and some portions of the judgments might, I think without loss, have been eliminated. Of the same class is the report of the case of *Mooers et al.* v. *Gooderham & Worts* (*Ib.* 451), which was hardly worth reporting at all.

Again, in the case of the *Dominion Loan Company* v. *Kilroy* (*Ib.* 468), the conceded facts were: That the husband had failed, and could not, in his own name, carry on business; that a mercantile trading was carried on in the name of his wife by himself as her agent, she in no way interfering with the management; that goods were sold to the wife by persons who were well aware that the husband could not carry on trade in his own name. All this is fully stated in the judgments of the learned judges. Why was it necessary to give the facts in detail? In this case five pages of the report are occupied with a statement of the facts and arguments of counsel, no part of which should have been reported.

In the case of *Reddick* v. *The Saugeen Mutual Insurance Company* (*Ib.* 506), we find that no less than nine pages are occupied with a statement of the pleadings and facts. Two pages at the utmost should surely have sufficed for all this, the facts being fully stated in the judgment of the court.

Then take the case of *Cameron* v. *Cameron* (*Ib.* 561). In this case the undisputed facts were that a conveyance had been made by the defendants to the plaintiffs, under a mutual misapprehension of the facts, and without any fraud or deceit practised by the defendants upon the plaintiffs. The only parts of the judgment necessary to report were those portions showing the law to be, that as long as contracts entered into under a mutual misapprehension of facts are executory, such contracts cannot be enforced, even in the absence of fraud or deceit; but when the transaction is consummated, as in this case, by the execution and delivering of the conveyance, the parties must be left to their right as defined by the conveyance itself. It was well that the reported judgment should point out the difference between these two states of facts, referring in the one case to those cases that define the rights of the parties in the case of executory agreements, and those cases which define the rights of the parties where a conveyance has actually been delivered, but no other portions of the judgment are of any actual interest to the profession.

In England the reports of cases in the Court of Appeal are very much more numerous than the reports of cases in the Divisional Courts and before single judges. In this Province the reverse is the case. Of course cases that indicate judicial opinion in regard to statute law, even in the first instance, should be somewhat fully reported; but as cases of magnitude and doubtful law usually find their way to the Court of Appeal, it is obvious that many of them are needlessly reported in the lower courts. The reports of our Court of Appeal are too full, and much might be eliminated in the direction I have pointed out.

In short, I believe that too many cases are reported, and that the reports themselves are unduly long. The remedy for all this is in the hands of the profession, or rather of the Law Society which represents them.

No doubt it is much easier to give the judgment of the judges precisely as delivered, and to detail the facts, pleadings and arguments of counsel from the statement of the judge, or from the briefs of counsel, and thus avoid a good deal of the labour which a critical condensation and arrangement of the case, such as I have suggested, involves. But if the reports are to be made what they ought to be, this labour must not be shirked.

There are practical difficulties in the way of improvement in the lines indicated, but they should as far as possible be overcome. This can only be done by more time and thought being devoted to the reports, and by the help of the judges themselves. It may be that this increased responsibility cannot reasonably be expected to be assumed by the reporters at their present salaries; and we must remember that in England there are, we believe, two editors and some thirty reporters, but something should be done in the premises. At least let it be understood that the profession desire a more careful selection of the cases to be reported, and a freer hand in striking out unnecessary matter.

LEX.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We now conclude our notes on cases in the first instalment of the Law Reports for December.

WILL—CONSTRUCTION—"PROPERTY AT MY BANK."

In re Prater Desnige v. *Beare*, 36 Chy. D. 473, is a decision of Chitty, J., upon the construction of a will whereby the testator bequeathed "my property at R.'s bank." At his death he had at R.'s bank a cash balance, also certificates of shares, some of which were inscribed in his name, and others payable to bearer. Chitty, J., held that only the cash balance passed by this bequest, because the share certificates were not property at the bank, but merely evidence of title to things out of the bank, and not things in it.

PRINCIPAL AND AGENT—MANAGER OF TRADING COMPANY—PROMISSORY NOTE SIGNED ON BEHALF OF COMPANY.

In re Cunningham & Co., 36 Chy. D. 532, the question was whether a note given by the manager of a trading company, and signed by him "in representation" of the company, was binding on the company? The note was given under the following circumstances: The company in question were importers and traders in tinned ox tongues and other provisions. Hunter, who was appointed to take entire charge of the interests of the company in South America, but having no express power to sign or accept bills or promissory notes on behalf of the company, was desirous of entering into a contract with one Liberos for the supply of ox tongues to the company in South America; but Liberos refused to enter into the contract unless a guarantee was given by some third person. J. C. Simpson agreed to give the guarantee by depositing £1,000 in a bank to the order of Liberos. As an indemnity to Simpson, Hunter gave him the promissory note in question for £1,000, signed by him "in representation" of the company. The company made default in carrying out the contract with Liberos, and, under a power contained in it, the deposit which was paid to him was forfeited. No goods were supplied to the company under the contract. The company never recognized the note, and it was dishonoured at maturity. The company being in liquidation, Simpson claimed to prove the note, but his claim was resisted by the liquidator, and North, J., held that under the circumstances the company were not bound by it, on the ground that the note was not given in order to carry on the business in the ordinary way.

VOLUNTARY GIFT—TRUST—DELIVERY OF PROMISSORY NOTE TO BE HANDED OVER TO THIRD PERSON AFTER DEATH OF MAKER.

In re Richards, Sherestone v. *Brock*, 36 Chy. D. 541, is a decision of North, J. In this case a testatrix made her will in 1873, bequeathing a legacy of £150 to Ellen Harris, who was her domestic servant. In August, 1877, the testatrix made a promissory note for £200, payable on demand to Ellen Harris, and handed the note to the testatrix' solicitor, with instructions to retain it till the

testatrix' death, and then to give it to Ellen Harris, should she remain in the testatrix' service until her death. The testatrix had previously told Ellen Harris that, if she would continue in her service until her death, she would leave in the care of her solicitor a present for her beyond what she might leave to her by her will. Ellen Harris remained with the testatrix until her death, and the note continued in her solicitor's hands, and she had never revoked the directions she had given him about the note. The question was whether there had been a valid gift of the promissory note, and North, J., held that there had; that the solicitor had been constituted a trustee of it, and that he might hand it over on the prescribed conditions being fulfilled, and that Ellen Harris was therefore entitled to prove for the amount of the note against the estate of the testatrix.

MORTAGOR AND MORTGAGEE—REDEMPTION ACTION—MORTGAGEE IN POSSESSION, OVERPAID—RESTS—COSTS.

Ashworth v. *Lord*, 36 Chy. D. 545, was an action for redemption brought by an assignee of the equity of redemption. The defendants set up the Statute of Limitations, and claimed that a large amount was still due to them. The defence of the statute was overruled, and the usual accounts ordered, and in case it should appear defendants were overpaid, further consideration was adjourned. The result of the accounts showed that the defendants, who went into possession in 1857, had been fully paid in November, 1866, and that a balance of £618 was due from the defendants; and it was held on further consideration by North, J., that the defendants were liable to have the account taken with annual rests from the time the mortgage was fully paid, following *Wilson* v. *Metcalfe*, 1 Russ. 530, and must also pay the costs of the action.

STATUTE OF LIMITATIONS—TENANTS IN COMMON—RECEIPT OF RENTS BY FATHER AS BAILIFF FOR INFANT SON.

In re Hobbs, *Hobbs* v. *Wade*, 36 Chy. D. 553, is a decision of North, J., upon a question arising under the Statute of Limitations. A father became in 1870 tenant in common with his two sons, Samuel and John. John was then an infant, and attained twenty-one in 1877, and died in May, 1884, and his share descended to his brother Samuel. The father and sons were entitled to the estate in the following proportions: The father was entitled to one moiety, the sons were entitled to one-fourth each, but subject to the right of the father to one-half of the rents of their respective shares so long as he remained a widower. In 1870 the father entered into the receipt of the whole rents, and continued in possession for more than twelve years without accounting to his sons for their shares, or acknowledging in writing their title. In February, 1884, the father married again, and in November, 1884, he died; and it was held that as to the one-eighth share to which John became entitled in possession in 1870, his father must be deemed to have been in possession as his bailiff, and therefore Samuel was entitled to the whole of John's share, but that his title to his own one-eighth, to which he was entitled in possession in 1870, was barred by the Statute of Limitations. See *In re Taylor*, 28 Gr. 640.

PRESUMPTION OF DEATH—PERSON NOT HEARD OF FOR SEVEN YEARS.

In re Rhodes, *Rhodes* v. *Rhodes*, 36 Chy. D. 586, the rule laid down in *Re Phene's Trusts*, L. R. 5 Chy. 139, and *Nepean* v. *Doe*, 2 M. & W. 894, that where a person has not been heard of for seven years, though there is a presumption of law that he is dead, there is no presumption that he died at any particular time within the seven years, but the onus of proving the particular time of death is on the person whose title is founded on death at that time, was re-affirmed by North, J.

FOREIGN LAW—SUCCESSION TO PERSONAL ESTATE—DECISION OF FOREIGN TRIBUNAL—COMITY OF COURTS.

In re Trufort, *Trafford* v. *Blanc*, 36 Chy. D. 600, Stirling, J., held that when a foreign tribunal, having jurisdiction in the place of domicile of a deceased person, had adjudicated on the right of succession to his personal estate, the English Courts are bound by, and will follow the adjudication as to personal property in England, to which the deceased died entitled.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—COSTS—DELAY—DAMAGES.

Rowe v. *School Board for London*, 36 Chy. D. 619, was an action by a vendor for specific performance of an agreement made by the purchaser of land, whereby he agreed as part of the consideration to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way, or make a road and sewers until long after the time fixed, and in addition to specific performance the vendor also claimed to recover damages, as the vendor's other land had remained unproductive until the road was made. But Kekewich, J., held that although entitled to specific performance of the agreement, the plaintiff was not also entitled to damages, because the agreement in question was governed by the same rule as a contract to sell real estate, and according to the rule laid down in *Bain* v. *Fothergill*, L. R. 7 H. L. 158, a vendor is not liable for damages for delay unless his conduct is tainted with fraud and bad faith.

DAMAGE—NEGLIGENCE OF PUBLIC COMPANY—ACTION—COMPENSATION—COSTS.

Evans v. *Manchester*, 36 Chy. D. 626, was an action brought to recover damages from a canal company under the following circumstances:—The plaintiffs were the owners of a mill which had been built on the banks of a canal constructed under an Act of Parliament. In consequence of the working of a coal mine the canal and mill had subsided, and water leaked from the canal into the mill, for which injury the plaintiff sought to recover damages, and an injunction. It was found that the canal company might have prevented the damage, and were therefore guilty of negligence. And it was held by Kekewich, J., that though a company authorized by Act of Parliament were not under the same liabilities as a private person, they were, nevertheless, liable for damages if guilty of negligence, and that the canal company were therefore bound to compensate the plaintiff, but he held that the compensation must be recovered in

the way pointed out in the company's Act, and not by action. He therefore simply found that the plaintiffs were entitled to compensation for the damage past, and also that the defendants were liable to make good any damage occasioned by the escape of water from the canal on to the plaintiff's premises consequent on any further subsidence of the canal, and awarded the plaintiff the costs of the action.

SHARES — PLEDGE OF CERTIFICATES — BLANK INDORSEMENT — BROKER — FRAUDULENT TRANSFER — BONA FIDE HOLDER.

Williams v. *Colonial Bank*, 36 Chy. D. 659, is an adjudication of Kekewich, J., upon the conflicting rights of a *bona fide* holder of certain share certificates and the true owner thereof, as to their respective rights therein. The owners, in order that the shares might be registered in their own names, signed blank transfers indorsed on the share certificates, and gave them to their brokers, who fraudulently deposited them with the defendants as security for advances, and afterwards become bankrupt. The shares, according to mercantile usage, were treated as securities to bearer, and the defendants took them *bona fide*. The indorsement on the shares, however, were not so attested that the shares could be registered. Under the circumstances it was held that the owners must be taken to have given the brokers authority to deal with the certificates, and that the defendants were entitled to hold them, but that the plaintiffs were not bound to do anything in order to enable the defendants to have the transfers registered; and it was also held that bankers are not bound to make inquiry as to securities passing by delivery, which are deposited with them by brokers as security for advances.

COMPANY — POWER TO BORROW MONEY — IMPLIED RESTRICTION — INVALID CHARGE — POWER OF CORPORATION — ASSENT OF ALL THE MEMBERS.

Wenlock v. *River Dee Co.*, 36 Chy. D. 674, deserves notice for two or three points decided by Kekewich, J., in reference to the powers of incorporated companies. He held that where, by an Act of Parliament, a corporation is empowered to borrow a certain sum of money, a restriction against borrowing more will be implied; and where an Act of Parliament imposes on a company restrictions as to dealings with its property, the assent of every individual shareholder, will not make valid, as against the corporation, that which it is restrained from doing; and where an Act of Parliament made the certificate of certain commissioners conclusive evidence of a valid charge under an Act, such certificate would nevertheless not give validity to a charge created by the company in violation of the Act of incorporation.

SPECIFIC PERFORMANCE — DAMAGES — MARRIED WOMAN — SEPARATE ESTATE.

The only remaining case in the Chancery Division is *Foster* v. *Wheeler*, 36 Chy. D. 695. This was an action for specific performance of an agreement whereby the defendant agreed with the plaintiff that she would enter into an agreement with one Ord for a lease at a certain rent for such time and subject

to such covenants as Ord should approve, and would accept such lease and execute a counterpart. The premises in question were, at the time of the agreement, held by the plaintiff under lease from Ord, and at the request of the defendant he had moved out of the house. In default of specific performance the plaintiff claimed damages. Kekewich, J., held that the agreement could not be ordered to be specifically performed, but that the plaintiff was entitled to damages.

The second instalment of the Law Reports for December comprises 19 Q. B. D. pp. 685-710,—this merely covers the index of this volume, and one case not necessary to note here:—36 Chy. D. pp. 701-831; and 12 App. Cas. pp. 651-763.

COMPANY—AGREEMENT TO PAY CLAIM IN PAID-UP SHARES—CONTRIBUTORY—SPECIFIC PERFORMANCE OF AGREEMENT TO TAKE SHARES—COSTS—APPEAL, ADDITIONAL EVIDENCE ON APPEAL—BOOKS OF COMPANY.

In re Baranagh Oil Refining Co., Arnot's Case, 36 Chy. D. 702. Subject to confirmation by a meeting of shareholders, it was agreed by directors of a company to give, and by Arnot to accept, fully paid-up shares in satisfaction of his admitted claim against the company for services rendered. At the shareholders' meeting it was subsequently resolved "that a sum of £2,875 be voted to Captain Arnot, which he agreed to take in 575 fully paid-up shares." The agreement was not registered, and there was no sufficient evidence that there had been any distinct allotment or acceptance of shares pursuant to the agreement. The company having become insolvent, the liquidators applied to have Arnot placed on the list of contributories as holder of 575 unpaid shares, but the Court of Appeal (Cotton, Bowen & Fry, LL.J.), overruling North, J., held that although there had been nothing amounting to a payment in cash by Arnot for the shares, yet that as the company had agreed to give, and he had agreed to take, paid-up shares, he could not be compelled to take unpaid shares, and therefore was not liable as a contributory. But inasmuch as the appeal was decided upon additional evidence, allowed to be given on the appeal, which the court thought ought to have been given in the court below, no costs of the appeal were given. There is another point decided in this case worthy of note, and that is that the books of the company were held to be only *prima facie* evidence of the facts recorded therein, and although the books contained entries tending to show that Arnot had accepted and dealt with some of the shares in question, he was permitted to show that such dealing took place in reference to other shares previously allotted to and paid for by him, and that the numbers were wrongly filled in by a clerk of the company.

PATENT—COMBINATION—INFRINGEMENT—ACQUIESCENCE—ESTOPPEL.

Proctor v. *Dennis*, 36 Chy. D. 740, is an important decision on questions of patent law, in which the Court of Appeal (Cotton, Bowen & Fry, LL.J.) reversed the Vice-Chancellor of Lancaster. The action was to restrain the infringement of a patent, and was brought against the maker of the infringement and two of

his vendors. The patent was for a combination of known mechanical contrivances producing a new result, and it was held that the omission of the specification to point out what parts are old and what new, would not affect its validity, although if the alleged infringement consisted only in taking part of the combination, it would be necessary that the patentee in his specification should have claimed the part so taken as new; and it was held that the patent was infringed by a machine producing the same result by a combination of mechanical equivalents, with some alterations and omissions which did not prevent the new machine from being one which embraced in substance the patented invention. The vendors claimed that the plaintiff was estopped from proceeding against them, because, hearing that they were going to set up machines of the kind in question, he had gone to them and said they would find his a better machine than that of the maker of the alleged infringement, without giving them any notice that he claimed the latter to be an infringement. The Vice-Chancellor held that this conduct debarred him from relief as against the vendees, but the Court of Appeal were unanimously of opinion that as the vendors did not depose that they were ignorant of the existence of the plaintiff's patent, and there was no reason to believe they were ignorant of it, or that the plaintiff supposed them to be so, what had taken place amounted to neither acquiescence nor estoppel by conduct; and that there was no duty resting on the plaintiff to warn them that in purchasing the other machines they were infringing his patent.

ESTATE TAIL—ENLARGEMENT OF BASE FEE—FURTHER ASSURANCE—SPECIFIC PERFORMANCE OF AGREEMENT BY TENANT IN TAIL—3 & 4 W. 4, c. 74, ss. 19-47—(R. S. O. 1887, c. 103, ss. 23, 36.

In *Banks* v. *Small*, 36 Chy. D. 716, the Court of Appeal (Cotton, Bowen & Fry, LL.J.), unanimously affirmed the decision of Kekewich, J., 34 Chy. D. 415 (noted *ante* vol. 23, p. 164.) In this case it may be remembered it was sought to compel a tenant in tail in remainder who had barred the entail without the consent of the protector of the settlement, to execute a further assurance pursuant to his covenant on the death of the protector, so as to enlarge the base fee previously created into an estate in fee simple. The action was resisted on the ground that the jurisdiction of the court was ousted by 3 & 4 W. 4, c. 74, s. 47; (R. S. O. 1887, c. 103, s. 36), but it was held that notwithstanding this provision the plaintiff was entitled to the relief claimed, and the judgment of the Court of Appeal is valuable as showing the true scope of s. 47. Fry, L.J., thus sums up his conclusion: "I have come, therefore, to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution, or non-execution of powers, or on any other ground, an assurance intended to operate under the Act, which is not effectual under the Act; but that it leaves the jurisdiction of the court with regard to enforcing contracts ***against the persons who have entered into them*** totally unaffected." In short, according to the view of the Court of Appeal, the statute merely follows in the lines of the old case of *Attorney-General* v. *Day*, 1 Ves. sen. 218, decided by

Lord Hardwicke long before its enactment; in which he held that although a Court of Equity would grant specific performance as against a tenant in tail who had entered into a contract to bar the estate tail, yet it would not do so as against the issue in tail, for they take by a title paramount *in formam doni.*

PRACTICE—AMENDMENT OF PLEADING ALLOWED, NOTWITHSTANDING AN ORDER STRIKING OUT PART SOUGHT TO BE INSERTED WAS UNREVERSED.

The case of *Kurtz* v. *Spence*, 36 Chy. D. 770, seems to lay down a novel and curious precedent in practice. An application was made to Chitty, J., on 12th August, 1886, to strike out part of a statement of claim on the ground that the question raised thereby could not be properly tried in the action. Chitty, J., granted the order, which was not appealed. Subsequently, on the 21st July, 1887, an opinion was expressed in the Court of Appeal that the question raised by the passage struck out could properly be tried in such an action as the present. The plaintiffs then applied to Kekewich, J., to amend their statement of claim by inserting the clause struck out by the order of Chitty, J., which application was refused. The plaintiffs then applied for leave to appeal from the order of Chitty, J., and also appealed from the order of Kekewich, J. The Court of Appeal refused leave to appeal from the order of Chitty, J., but offered to dismiss the action without prejudice to the plaintiffs bringing another; but on the appeal from the order of Kekewich, J., the court allowed the amendment, Fry, L.J., dissenting.

COMPANY—WINDING UP—DIRECTORS—CREDITOR—PAYMENT OF DIVIDENDS OUT OF CAPITAL—DELUSIVE BALANCE SHEETS—AUDITOR, LIABILITY OF.

The case of *Leeds Estate Building Co.* v. *Shepherd*, 36 Chy. D. 787, will, we fancy, be read with a good deal of interest in these days of insolvent banks and companies. It certainly opens up a very serious field for thought, for those who assume the responsible positions of directors and auditors of joint stock companies. It is the old story of directors leaving everything to the auditor and manager, and the manager making out delusive balance sheets, and the auditor and directors certifying them; payments of dividends out of capital, assets overestimated, followed by the inevitable crash. Stirling, J., held that directors were not justified in leaving everything to the auditor and manager, and were personally liable, jointly and severally, to make good all dividends paid out of capital, and also all sums paid thereout to the directors for remuneration and to the manager in the shape of bonuses, which they were not entitled to unless the company paid a certain dividend; and he also held that it was the duty of the auditor not to confine himself to verifying the arithmetical accuracy of the balance sheets, but that he was bound to inquire into their substantial accuracy, and to ascertain that they contained the particulars specified in the articles of association, and were properly drawn so as to contain true and correct representations of the company's affairs; and that as the improper payments by the directors were the natural consequence of the breach of duty on the part of the manager and auditor, they were also liable in damages to the amounts so paid. The par-

ticulars in which the directors failed in their duty are thus specified by the learned judge:—(1) They never required the statement and balance sheets to be made out in the manner prescribed by the articles. (2) They failed properly to instruct the auditor, or at all events, to require him to report on the accounts and balance sheets in the mode prescribed by the articles. (3) They were content throughout to act on the statements of the manager, without inquiry or verification of any kind other than the imperfect audit of the accounts by the auditor.

ARBITRATION—BY-LAW PROVIDING FOR ARBITRATION.

In *Walker* v. *General Mutual Building Society*, 36 Chy. D. 77. This was an action brought by a member of the defendant society who claimed to have (under the provisions of the by-laws) withdrawn from it, to recover payment of the subscriptions he had paid on his shares and for the appointment of a receiver. Under the by-laws it was provided that the subscriptions should be repaid to a withdrawing member "provided there shall be sufficient funds available;" and also that the board should have power to determine all disputes between the society and any member or person claiming an account of any member, and that if the party should be dissatisfied with their decision the matter should be referred to arbitration. The society declined to pay the plaintiff, on the ground that they had not sufficient funds on hand, the plaintiff claimed that they had. On the motion of the plaintiff for a receiver, the preliminary objection was taken that the jurisdiction of the court was ousted by the by-law providing for arbitration. The plaintiff waived any objection on the ground that the defendant had not moved to stay the proceedings, and the Court of Appeal (Cotton, Bowen & Fry, LL.J.), held, affirming North, J., that though the plaintiff as a retired member might be in some sense a creditor, he was still so far a member as to be bound by the rules, and that the dispute must be referred to arbitration.

We proceed now to the appeal cases:—

PATENT—CHEMICAL PROCESS—SPECIFICATION.

In *Badische* v. *Levinstein*, 12 App. Cas. 710, the House of Lords determined that a patent for producing colouring matters for dyeing and printing by a chemical process was valid, and their Lordships reversed the decision of the Court of Appeal, 29 Chy. D. 366, noted *ante* vol. 21, p. 315, and restored the judgment of Pearson, J., 24 Chy. D. 156. Lord Halsbury, L.C., says that the chief reliance of the respondent was placed upon an argument as new as it was unsound, and for which he thought there was not the least judicial authority. This argument, he said, was: This thing is not new, because things of the same sort in analogous chemical relations had been discovered; people ought to have discovered it, or were on the brink of discovering it; therefore this true and first inventor only completed by one step the route to which chemical discoveries had been tending without his aid. Such a principle applied to patent law, he considered, would be fatal to the rights of all inventors.

PRINCIPAL AND AGENT—SALE OF AGENT'S OWN PROPERTY TO PRINCIPAL—NON-DISCLOSURE OF INTEREST.

Cavendish v. *Fenn*, 12 App. Cas. 653, was an application by a shareholder of a company in liquidation to compel a director to account for alleged breach of trust, on the ground that the director had allowed the company to purchase a property in which he had an interest, and at a price far exceeding the alleged value. The application, in the opinion of the House of Lords, failed on the evidence, and on this ground the decision of the Court of Appeal (29 Chy. D. 795) was affirmed by their Lordships; and their Lordships further considered that it was doubtful whether the appellant, whose shares were fully paid up, and who failed to show that he would have any pecuniary interest in the result, had in any case any right to invoke the assistance of the Court.

SHIP—MASTER—BILL OF LADING—ERROR IN DATE OF SHIPMENT, LIABILITY OF MASTER FOR.

The short point decided by the House of Lords in *Stumore* v. *Breen*, 12 App. Cas. 698, was, that the employment of a ship's broker at a foreign port to procure a cargo and adjust terms for its carriage does not give the broker any implied power to relieve the master, when signing the bills of lading presented to him, from seeing that the dates of shipment are correctly stated therein; and that for breach of this duty the master is, notwithstanding the employment of the broker, liable to the owners. The Lords reversed the Court of Appeal and restored the judgment of the Divisional Court.

TRUSTEE—INVESTMENT—HAZARDOUS SECURITY.

Learoyd v. *Whitley*, 12 App. Cas. 727, was an appeal from the Court of Appeal in the case *In re Whitley & Whitley* v. *Learoyd*, 33 Chy. D. 347, noted *ante* vol. 23, p. 29. Trustees invested the trust fund on a mortgage of a brickfield, with buildings and machinery and plant affixed to the soil, being advised by competent valuers that the property was a good security for the amount invested, such valuation being based on the business being a going concern. The business came to an end, the property depreciated in value, and the money invested could not be realized from the security. The Lords held the trustees liable to make good the loss, on the ground that the security was in fact a speculative trading venture, the propriety of investing in which the trustees were bound to exercise their own judgment upon, and could not delegate to others; and though they had acted *bona fide*, they were nevertheless liable.

ARBITRATION—MISTAKE OF ARBITRATOR IN LAW—REVOCATION OF SUBMISSION—JURISDICTION OF COURT TO GIVE LEAVE TO REVOKE SUBMISSION.

East and West India Dock Co. v. *Kirk*, 12 App. Cas. 738. In this case a reference was pending between the parties in respect to matters in difference which arose in the execution of a contract, which by the terms of the contract were required to be referred to an arbitrator. The arbitrator received evidence

which was objected to as tending to vary a contract in writing, and other evidence which in one view of the contract was inadmissible, but admissible in another. The party objecting then applied to the court under 3 & 4 W. 4, c. 42, s. 39, (see R. S. O. 1887, c. 53, s. 16), for time to make the submission. The Divisional Court and the Court of Appeal refused the application, but the House of Lords held that the court had power to give leave to revoke a submission when it appeared that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction, and that this power should be exercised unless the parties agreed to the arbitrator stating the questions arising, as to the admissibility of the evidence, in a special case for the opinion of the court.

PRACTICE—APPEAL NEW TRIAL—JURISDICTION OF COURT OF APPEAL TO REVERSE A VERDICT, ORD. 58, R. 4, (ONT. R. 321).

In *Toulmin* v. *Millar*, 12 App. Cas. 746, the action was tried by a jury and a verdict given for the defendant, a new trial was ordered by the Divisional Court on the grounds of misdirection, and the verdict being contrary to the weight of evidence. The Court of Appeal held that the verdict was against the weight of evidence, and under Ord. 58, r. 4 (see Ont. R. 321), instead of ordering a new trial assessed the plaintiff's damages at £676 19s. 6d., and ordered judgment to be entered for him for that sum. There are cases in our own courts in which a similar practice has been followed, *e.g.*, *Stewart* v. *Rounds*, 7 App. R. 515, *Lancey* v. *Brake*, 10 O. R. 428. Lord Halsbury, L.C., in giving judgment, though not expressly deciding the point, expressed grave doubts as to its propriety, their lordships being of opinion that the judgment of the Court of Appeal was wrong on the facts, reversed the decision. On the point of practice Lord Halsbury said: "I doubt very much whether Ord. 58, r. 4, gives any such jurisdiction as the Court of Appeal claimed to exercise in finding a verdict for themselves, and actually assessing damages for breach of a contract."

Notes on Exchanges and Legal Scrap Book.

AMERICAN BAR ASSOCIATION.—We have received the report of the tenth annual meeting of the American Bar Association, which was held at Saratoga Springs, New York, on the 17th day of August last and the two following days. The report is a handsome volume of some 450 pages. The discussions which took place and the addresses which were delivered are instructive, serving as they do to show the directions in which leading members of the legal profession in the United States think that changes should be made. As a guide to legislators, the opinions of those who are so intimately acquainted with the working of the law in practice, should be of great value.

AN OLD WARRANT.—The original warrant on which John Bunyan was arrested and imprisoned when he wrote the "Pilgrim's Progress," is said to have been recently found in England. It covers half a sheet of foolscap, and in it Bunyan is described as a "tynker."

LETTER-PRESS COPIES.—A curious question in regard to the law of evidence arose in Iowa, on the trial of an agent for embezzlement. The question arose whether letter-press copies of the defendant's letters, containing statements of his accounts with his employers, could be put in as evidence to prove the commission of the offence alleged. No effort was made to show that the original letters could not be produced. It was held that letter-press copies are but copies, and cannot be introduced if the originals are not accounted for.

LIABILITY OF OWNERS OF REAL ESTATE.—In the State of Delaware, in *Diamond Slate Iron Co.* v. *Giles*, reported in the *National Law Review*, it was decided that, while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by express or implied invitation are protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited person had no reason to look for. The invitation to come upon dangerous premises, without stating the danger, was culpable, and an injury resulting from it is deserving of compensation in the case of the servant of the person extending the invitation, as in any other case.

CONTEMPT OF COURT.—In a case reported in our American exchanges the defendant was a party to certain actions in the Supreme Court of Montana. While some of these actions were *sub judice*, he caused a telegram to be published in a newspaper of the city in which the court was sitting. This telegram falsely alleged that certain persons, whose names were given, had made a wager that, owing to the influence of adverse claimants, the Supreme Court would reverse its decision in the earlier of these cases. These had been decided in favour of the defendant, and the questions involved in the actions still pending were substantially the same as were formerly decided. Notwithstanding a disclaimer on oath by the defendant of any intention to treat the court with even the slightest contempt, his statement was not accepted, but it was held that the publication was a contempt. His motive was a corrupt one, viz., to improperly influence the court. The case is peculiar, mainly as an illustration of the influences against which an elective judiciary must be careful to guard, if the scales of justice are not to incline unfairly to one party or another. A judge who is naturally thinking of his chances of re-election may fairly be supposed to be amenable to the influence of public opinion, and if he is a conscientious man, there may be an unfair rebound in the opposite direction.

A SLANDER SPOKEN IN A FOREIGN LANGUAGE.—In the case of *McLeod* v. *McLeod*, tried at Sherbrooke, in the Province of Quebec, and reported in *The Legal News*, the plaintiff had used language in speaking of the defendant which was *prima facie* slanderous. It appearing, however, that the words complained of were spoken in Gaelic, it was objected that, inasmuch as Gaelic is a foreign language, it is not sufficient to set forth the alleged slander by means of an English translation, but that the very words used should be set forth, accompanied by a translation and evidence of its accuracy. The conclusion arrived at was that while there was no Quebec case in point, the English and American authorities undoubtedly sustained the objection. It did not appear that the defendant had used the words set forth in the declaration, but rather that he used certain other words which, when translated into English, may have the same meaning. The action was accordingly dismissed.

RIGHT OF WAY.—In *Whaley* v. *Jarrett*, in the Wisconsin Supreme Court, the defendant had a right of way over land belonging to the plaintiff. This right was based on a deed granting "easement of travel and private road privilege." It was held that the plaintiff had a right to erect gates at each end of the way for the protection of his land, such gates being sufficiently wide and conveniently hung, and not interfering with the reasonable enjoyment by the defendant of his right of way. The court thought it settled that, if the land-owner is not restrained by the terms of the grant of a right of way across lands used for agricultural purposes, he may maintain fences across such way, if provided with suitable gates. It is a principle of law that nothing passes as an incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. The reasonable use and enjoyment of the way, the court maintained, is quite consistent with the right of the plaintiff to maintain proper gates at the ends of the lane for the protection of the land.

HOW TO GET OUT OF A STEAMSHIP BERTH.—A variety of opinion appears to prevail among Her Majesty's judges, as evidenced by the case of *Andrew* v. *Little*, upon the grave question how to get out of a berth at sea. Mr. Justice Grove appears to think that one must get out anyhow, because he proposed to nonsuit a lady who complained that she was allowed only a chair to step upon. The Master of the Rolls and Mr. Justice Day appear to think that the right way is front foremost, while a learned judge, who is ex-president of the Alpine Club, and who ought to know, declared that he should have hesitated long before deciding whether to get out forwards or backwards when the ship was rolling. The jury were for the lady, who had stepped out forwards on the top rail of a chair which the stewardess had put for her, and had fallen out and hurt herself. The prevalent opinion on the bench shows how civilization has blunted the prehensile faculty in man. We venture to say that there is not an omnibus conductor in London who will not affirm confidently that the right way to come

down from the top of an omnibus is with the face inwards, and they have not abandoned this view since the very general substitution of a staircase for a ladder. The attitude is not dignified, and would be inadmissible on the Matterhorn, where the eyes have to be used; but it is favoured by arboreal apes, the schoolboy climbing trees, and the hodman carrying loads. Whether a lady whose mode of leaving her berth is by stepping forward on the top rail of a chair is entitled to recover damages from the owners of the steamboat is one of those great questions which, like Mr. Jackson's thumb, seems specially reserved for the consideration of the House of Lords. It will then be for the Lords to say whether placing a chair beside a berth for a lady to step on is evidence of negligence proper to be left to a jury.—*Law Journal* (Eng.)

THE LAND OUR NEIGHBOURS LIVE IN.—We had in Missouri two notorious outlaws, brothers, named respectively Frank James and Jesse James. Their history was a long series of murders, train robberies, express robberies, bank robberies, horse-stealing, and other like crimes. One of them was assassinated by one of his "pals" in pursuance of an arrangement to which the Governor of the State seems to have been a party. He received a large reward for his crime, offered by the railroad companies on whose trains most of the depredations had been committed. He therefore pleaded guilty to an indictment for murder, was sentenced, and immediately pardoned by the Governor. The other brother, after remaining a fugitive in another State for a considerable time after this, finally concluded that he would come back to Missouri, cast himself upon the mercy of the people among whom he was so popular, face the music, get acquitted if he could, and thereafter live an honest life. He came back, and one of the most serious crimes he had to face was the charge of murder at Gallatin, Mo. A judge of the Supreme Court Commission vacated the judicial seat temporarily for the purpose of defending him as his counsel. He seems to have got clear of all the indictments against him either by acquittals or dismissals. The other day he visited St. Louis, and in the Criminal Court called upon the gentleman who had been his counsel. The judge of the Criminal Court is reported to have complaisantly come down from the bench to be introduced to the outlaw. He thereafter visited the Court of Criminal Correction, and the judge of this court was not ashamed to take him to dinner. He ought now to be elected Governor. Misssouri can do no less for him.—*American Law Review.*

AMERICAN DIVORCES.—In the Divorce Division on Tuesday, Sir James Hannen delivered a reserved judgment in the case of *Thompson* (otherwise *Turner*) v. *Thompson*. The petition was that of the wife, Mrs. Georgiana Turner, a British subject domiciled in England, for a divorce from Mr. Charles Peter Thompson, a citizen of the United States, and connected with the marine service. The marriage took place at St. Jude's, Southsea, on the 7th of November,

1872. They lived together in England until January, 1873, after which they went to America. In February, 1879, she instituted proceedings in the United States for a decree dissolving the marriage, and was successful. Afterwards she returned to England, and instituted proceedings here for the purpose of having her marriage declared null and void. Mr. H. B. Deane appeared for her, and when the case came before Mr. Justice Butt, he raised the question of jurisdiction, contending that if the marriage was absolutely dissolved by the decree of the United States, then there existed no marriage between the parties upon which this court could be called to pronounce any opinion, his lordship directing that the case be argued by the Queen's Proctor. The arguments were heard before Sir James Hannen, who reserved his judgment. Sir James Hannen now said he was of opinion that this court had no jurisdiction, in the sense that the marriage was duly and absolutely dissolved by the decree in the United States court, and therefore there was no marriage existing between the parties to be dissolved and declared null and void by this court. The husband was domiciled in the United States, and after his marriage the petitioner took up her permanent abode in that country, and completely acquired a domicile there. Her suit, consequently, would be dismissed.—*Keble's Gazette* (Eng.).

SUPPLY OF INTOXICATING LIQUORS TO CLUBS.—The decision of Mr. Justice Stephen and Mr. Justice Charles in *Evans* v. *Hemingway*, some time ago, is an illustration of the application of the law of licensing to clubs. On proof of the supply of intoxicating liquors, and the passing of money, it lay on the defendant to show that the place was a club. It has always been assumed by the Inland Revenue and in the courts that proprietary clubs are equally exempt with members' clubs. The exemption of members' clubs is clear, because the liquor is the member's own, and he contributes towards funds of his club to the extent of what he orders, and does not buy the liquor. The statute requires that there shall be a sale. There is no sale in members' clubs; but is there a sale upon which a conviction may be obtained in a proprietor's club? The better opinion appears to be that there is not, because clubs like Boodle's and White's could not take out a license—at all events not a spirit license—if they wished, not being intended to be kept as places of public resort. In this state of the law the justices in the case in question may well have been puzzled to know what points they ought to find as a basis for the decision of the Queen's Bench. Eventually, in answer to a somewhat leading question of the court, they found that the arrangements representing the establishment as a club was a pretence. If by this they meant that the place was not a club at all, there was no more to be said, but they went on to say that, "in fact the manager was the proprietor of the establishment," which may mean merely that it was a proprietary club. The court evidently took the former view of the finding, and the case cannot be considered to decide that all proprietary clubs must take out a license.—*Law Journal* (Eng.).

THE ABOLITION OF CAPITAL PUNISHMENT.—C. H. Eaton, D.D., in the *Criminal Law Magazine*, examines the grounds on which capital punishment should be retained or abolished. The natural conservatism of humanity retards changes in laws which have worked more or less successfully for centuries; but experience and widening intelligence at last reveal their defects, make their enforcement more difficult, and suggest the remedy. Such a time, Dr. Eaton thinks, has come in the history of capital punishment. The classes of offences for which the death penalty is inflicted have become fewer, and in some parts of the world the penalty of death has been abolished. The article in question first reviews the arguments in favour of capital punishment. These are, he thinks, mainly three.

The first of these recognizes, with Blackstone, "the revealed or divine law, which is part of the law of nature directly expounded by God." The behest of that law is, "Whoso sheddeth man's blood, by man shall his blood be shed." In the Mosaic law the penalty of death is applied to many offences, and the *lex talionis* pervades the Jewish code. It is argued that this code was of but local and temporary application, and is not binding on us. That may be granted; but if divine wisdom prescribed laws which inflicted the death penalty, then there must have been states and conditions of society in which it was wise and humane to inflict capital punishment, and that, too, for a considerable variety of offences. If so, then it surely rests on the advocates for the abolition of capital punishment to show that we have so far departed from the states and conditions in which divine wisdom required the death of the transgressor for the good of the community, that we can afford to ignore these precepts of the Mosaic law. Dr. Eaton has gone but a small way towards meeting the force of the argument based on the Jewish civil law, when he has shown that it is no longer binding on us. It was the best possible law for the community for which it was designed. It remains for him to show wherein our circumstances and character differ so radically from those of the Israelites that its penalties are no longer applicable to any crimes, no matter how heinous, that may be committed among us. That task he has not attempted.

The second argument reviewed is that capital punishment is essential to the protection of society. It is admitted that as the law of self-defence permits man to kill his assailant when his own life is in danger, so, on the same grounds, society—an association of men—may protect itself. But the influence of sympathy for the culprit is so strong, say those who are opposed to capital punishment, that nothing but the evident hand of necessity can justify the destruction of one human being by another. Is not this sympathy often misplaced? The innocent victim of the criminal, and society at large, are the true objects of sympathy. If there was less notoriety given to the sayings and doings of the condemned criminal, and less publicity to the pity, rather than sympathy, which may be properly felt for him, his punishment would be more effective as a preventive measure than it now is. We confess that we fail to see that the writer of the article referred to above has established his contention that the adequate protection of society can be attained without the death penalty.

In dealing with the deterrent power of punishment, the article in question says that it is not true that the terrors of the gallows keep men from crime. It is asserted that the testimony from all parts of the world is conclusive that crime diminishes with the mildness of the laws. This assertion may easily be met by a *reductio ad absurdum.* If the amount of crime is in direct ratio to the severity of the penalties inflicted for it, why not diminish all penalties until they become purely nominal? Would crime then disappear, or would it increase? There is much wisdom in the Aristotelian doctrine of the mean. Undue severity begets sympathy for the criminal whose sufferings are so out of proportion to his crime, and it becomes almost impossible to secure convictions. Popular sentiment will not assist the enforcement of a law which inflicts death for an ordinary theft, and it fails through its very severity. On the other hand, when the punishment errs toward undue leniency, it fails to deter from violations of the law, and, consequently, to protect society. Imprisonment, doubtless, is an effective punishment for some offences; but what influence to restrain from the commission of murder can it have on the inmates of our prisons? And murder within the walls of our prisons is of not unfrequent occurrence.

The arguments relied on against capital punishment are the uncertainty of its infliction, its violation of the sanctity of life—the very principle which it is intended to defend—and, finally, the frequent execution of the innocent. The first and the last of these have force rather against the system of trial adopted, and the law governing the evidence on which a prisoner is to be convicted, than against the nature of the penalty to be meted out to certain crimes. In this country they are entitled, we venture to assert, to but little weight. As regards the second of these grounds, the surgeon inflicts pain for the very purpose of saving the patient from greater and more enduring misery. Does he thereby violate the very principle which he is supposed, as his special function, to uphold? In exactly the same way it is necessary for the state to take life in some instances, that the sanctity of life may be thereby more firmly established.

Correspondence.

THE LAW OF DIVORCE.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—I have read your article on divorce, in the January number of the CANADA LAW JOURNAL, with much interest. Having had occasion in the course of my experience in conducting applications for divorce before the Senate, to pretty thoroughly search the past cases for precedents, I have to say that there is one case on record of a petition to proceed *in formâ pauperis*, namely, that of Mrs. Campbell, in 1879. Her petition was granted, and she eventually obtained, after a severe struggle, an Act granting a separation similar to a judicial separa-

tion, under the present English Divorce and Matrimonial Act. In that case it was laid down that the applicant should, before presentation of the petition for a bill of divorce, present a petition making out a case for being allowed to seek a divorce without complying with the rule of the house respecting payment of fees. The petition would then be sent to the committee on standing orders for consideration, and report to the house whether the rule should be suspended. The privilege, when granted, is of no great benefit to the applicant, as the remission of the fee of $200 takes off but a small part of the applicant's expense. The advertising of the application in the *Canada Gazette*, and two local papers, the fees and travelling expenses of the petitioner and witnesses to and from Ottawa, and their hotel expenses while there, together with the fees of the local and the Ottawa solicitor, are really the substantial part of the expense.

Assuming that the costs of an action for a decree from a Court of Divorce, were one established in Canada, would be about equal to the costs of an ordinary contested Superior Court action down to judgment, I doubt if the costs would be much less than those attending the obtaining of a Parliamentary Divorce. In the cases in which I have been employed I have kept a record by items of the work done in each case, and the sum total, exclusive of the Government fees, printing, advertising, travelling and hotel expenses, amounts to about the costs of a contested action in the High Court of Justice.

I trust, however, that your timely article will be the beginning of an agitation which will eventually result in the establishment of a Divorce Court for this Province at least. The weak point of the present system is not the expense, but the uncertainty as to law and evidence, which results from matters of a strictly legal character being dealt with by laymen and a few members of the legal profession, who are unable to view such applications in a calm judicial spirit. The honourable gentlemen of the Senate assume to conduct proceedings incidental to divorce in a judicial as well as a legislative character, but the occasion is rare indeed that they ever rise to the former level.

A glance at the debates and journals of the House in the Campbell case will disclose bursts of passion and partizanship happily unparalleled in judicial circles. Frivolous technicalities of which country fence-viewers would not be guilty are frequently interposed. The religious convictions of a large number of the members of both houses also prove a stumbling block, as no argument, legal or otherwise, can successfully refute them. The really only redeeming point in the system is the suppression from the public of the evidence taken by the Select Committee.

Yours truly,

Ottawa, January 27th, 1888. J. A. GEMMILL.

DIARY FOR FEBRUARY.

1. Wed....Sir Edw. Coke, born 1552. C. C. non-jury sittings in York. Barristers' Examination.
5. Sun.....*Sexagesima Sunday.* W. H. Draper, 2nd C. J. of C. P., 1856.
6. Mon....L. S. Hilary Term begins, H. C. J. sit. begin.
7. Tues....Maritime Court sits.
10. Fri.....Canada ceded to G. B., 1763. Union of Upper and Lower Canada, 1841.
11. Sat. ....T. Robertson appointed to Chy. Div., 1887.
12. Sun.....*Quinquagesima Sunday.*
15. Wed....Ash Wednesday.
16. Thur ...Chy. Div. H. C. J. sits. end.
18. Sat. ....L. S. Hilary Term ends. H. C. J. sits. end.
19. Sun.....*Quadragesima Sunday. 1st Sunday in Lent.*
21. Tues....Supreme Court of Canada sittings begin.
24. Fri.....St. Matthias.
26. Sun.....*2nd Sunday in Lent.*

Reports.

COUNTY COURT OF THE COUNTY OF YORK.

[Reported for the CANADA LAW JOURNAL.]

TRADERS' BANK *v.* MCCONNELL & CO. CITY OF TORONTO, GARNISHEE.

Creditors' Relief Act—Attachment before any writ in sheriff's hands.

Where a judgment creditor obtained an attaching order in certain garnishee proceedings and duly served the same, and, before the return of the garnishee summons and the making of the final order for payment over, certain other judgment creditors placed writs in the sheriff's hands, who, however, had not levied thereunder until after the final order for payment over was made,

Held, on motion by the garnishee for an interpleader, that the attaching creditor was entitled to payment over by the garnishee of the money, and that the case did not come within the provisions of the Creditors' Relief Act.

[MACDOUGALL, Co. J.—February 3, 1888.

This was a motion made before the judge of the County Court of the County of York for an order in the nature of an interpleader order under the following circumstances:—On January 10th, the Traders' Bank recovered judgment against T. McConnell & Co. for $251.50 debt and $12.92 costs, and, having ascertained that the City of Toronto was indebted to the defendant on January 14th, the Traders' Bank obtained the usual attaching order and issued the same, and served it on that day on the City of Toronto. The garnishee summons contained in the order was made returnable on January 19th. On January 18th certain judgment creditors placed an execution in the sheriff's hands against T. McConnell & Co. On January 19th the Traders' Bank obtained the usual order for payment over on return of the garnishee summons and duly served the same upon the City. On January 20th the execution creditors, who placed writs in the sheriff's hands against T. McConnell & Co. on the 18th as above mentioned, served a notice on the City of Toronto, requiring it to pay any moneys in its hands belonging to T. McConnell & Co. to the sheriff, to be distributed under the Creditors' Relief Act, and on the 21st day of January the City of Toronto served notice of this motion upon the Traders' Bank, and also upon the said execution creditors who had placed writs in the sheriff's hands. No writs were placed in the sheriff's hands against T. McConnell & Co. prior to January 18th, 1888. The motion came up for argument upon the 26th of January, 1888.

A. H. F. Lefroy, for the Traders' Bank:—Our rights were fixed at the date of the issue and service of the attaching order. At that time no one had a *locus standi* under the Creditors' Relief Act as there were no writs in the sheriff's hands, much less had anything been levied by him under any writs. It is right on principle that a judgment creditor's rights should be fixed as of the date when he obtains an attaching order, because the only reason for not making an absolute order for payment over at once is that the garnishee may have some cause to show, and if in the event it turns out that the garnishee had no cause to show, the judgment creditor should not be prejudiced by a delay, which the event has proved to have not been required by the justice of the case. The authorities also bear out the proposition that the date of the attaching order is the date when the rights of the judgment creditor to the debt become fixed as against the judgment debtor and all claiming under the judgment debtor. *Tapp* v. *Jones*, L. R. 10 Q. B. 591; *Low* v. *Blackmore*, L. R. 10 Q. B. 485; *Ex parte Joselyne in re Watt* L. R. 8 Ch. D. 327, the last two of which were cases of a judgment creditor claiming against a trustee in bankruptcy, and very analogous to this case. The judgment creditors necessarily claim under the judgment debtor: *Martin* v. *Boulanger*, L. R. 8 App. Cas. 296. See also *Mac-*

fie v. *Pearson*, 8 O. R. 745, and the recent decision of Mr. Justice Ferguson in *Stuart* v. *Gough*, 23 C. L. J.

Akers, for the execution creditors:—The Creditors' Relief Act specially provides that any one attaching a debt shall do so for the benefit of the creditors generally (s. 37, ss. 3). So long as the money is not actually paid over it must go to the sheriff, *Dawson* v. *Moffatt*, 9 O. R. 484. To hold otherwise is to defeat the intention of the Creditors' Relief Act.

Bowes, for the City of Toronto.

MACDOUGALL, Co. J.—This is an application to me to direct an issue to try the right to certain moneys in the hands of the City of Toronto, owing to the judgment debtor.

The facts are as follows:—The Traders' Bank recovered a judgment on the 10th day of January, 1888, and on the 14th day of January applied for an attaching order, which was duly served on the garnishees on the same day. On the 18th of January Chisholm & Co. recovered a judgment against the same defendant, and placed an execution in the sheriff's hands for the amount of the same. On the 19th of January the attaching order was made absolute by me; on the 20th of January the execution creditor served a notice upon the City of Toronto requiring it to pay any moneys in its hands belonging to the judgment debtor to the sheriff, to be distributed under the provisions of the Creditors' Relief Act. The attaching creditor having issued execution against the City under these proceedings on January 21st, the solicitor for the City now applies to me to direct an issue to settle the rights of the parties. It is contended on the part of the Traders' Bank, that as no money has been levied by the sheriff, the provisions of the Creditors' Relief Act do not apply, and that they had become entitled to the funds attached by them, so far as the judgment debtor is concerned, the moment the attaching order was served, and they urge that the reason time is allowed to elapse to enable the garnishees to appear in attachment proceedings, is only to enable them to show the state of accounts between themselves and the judgment debtor, to claim any privilege of set-off or other reduction, should the fact be that the debt due by them did not equal the claim of the judgment creditor. But if the fact was that an indebtedness to the judgment debtor existed, equal to or greater in amount than the attaching creditor's claim, then the service of the attaching order *nisi*, and not the making of the final order, settled the rights of all parties. In the present case the attaching order *nisi*, was served before any execution was in the sheriff's hands.

The case of *Low* v. *Blackmore*, L. R. 10, Q. B. 485, and *Ex parte Joselyne*, L. R. 8 Ch. D. 327, were cited to show that in England it has been held that the service of the attaching order *nisi*, bound the funds, and cut out even the trustees in bankruptcy, who became such under an order made subsequent to the date of such service. It was also referred to in *Macfie* v. *Pearson*, 8 O. R. 745, in our own courts, in which it was held that the provisions of the Absconding Debtor's Act, prevailed as against the Creditors' Relief Act, the proceedings under the first-mentioned Act being antecedent to executions coming into the sheriff's hands. Judge ROSE, in that case, held that the provisions of the Creditors' Relief Act did not apply until moneys had been levied under the writs in the sheriff's hands, or, in other words, the mere placing of a writ of execution in the sheriff's hands, of itself, did not cause the Creditors' Relief Act to operate.

I was also referred to a clause in the Creditors' Relief Act, being s. 37, ss. 3, of the new revision, which enacts "that a judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors." This provision can only apply, however, to cases within the provisions of the Creditors' Relief Act, or, in other words, when the Act, by the entry of the sheriff in his books, has been brought into operation.

I may refer to s. 45, ss. 1 and 2, of the English Bankruptcy Act of 1883, an Act passed since the decision in *Ex parte Joselyne*, which expressly provides for the case of creditors attaching before the issue of the order in bankruptcy, enacting, that until the attached money is actually paid over, the trustee can claim the same for the benefit of creditors.

I must hold, therefore, in view of the authority of the cases above cited, that the service of the attaching order upon the garnishees effectually secured the moneys to the amount of the attaching creditor's debt. The provisions of the Creditors' Relief Act do not apply, and therefore I can direct no issue. The motion will be dismissed, but as the point appears to be a new one, I will make no order as to costs.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Common Pleas Division.

Divisional Court.]

BUSH *v.* FRY.

Replevin—Factors' Act, R. S. O. c. 121, *s.* 2, 4, 5 *—Agent entrusted—Sale of goods—Property passing.*

Replevin—F., a music teacher at Beardstown, Illinois, wrote K. & Co., of Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name to be subject to their order, but F. to pay freight charges in case of no sale, and return the piano to plaintiff, he, F., simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiff's piano manufacturers in Chicago, who, after communicating with F., shipped a piano to Beardstown, consequent to their own order, but to be delivered to F. on payment of the freight. The piano was delivered to F. at Beardstown, and its receipt acknowledged in a letter to plaintiff. It was then shipped by F. to Virginia City, Ill., and from there to F. at Toronto, under the assumed name of R., and was thence pledged by F., under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by D. to pay the charges as well as a further advance—F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises where it remained until replevied.

Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him.

Held, also, that F. was not an agent within the meaning of the Factors' Act, R. S. O. c. 121, s. 2, 4, 5, so as to enable him to pledge the piano: nor per ROSE, J., was he an agent entrusted.

A. Macdougall and *W. Nesbitt*, for the plaintiff.

Urquhart, for the defendant.

Divisional Court.]

COCHRANE *v.* HAMILTON PROVIDENT LOAN SOCIETY.

Ejectment—Judgment for default of defence—Estoppel.

Action for breach of an alleged agreement made between plaintiff, as mortgagor, and defendants, as mortgagees, whereby, in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage for one year from the 1st of April, 1882. The defence was that on the 17th of June, 1882, the defendants brought ejectment against the present plaintiff, setting up that by said mortgage on default of payment of the mortgage moneys, the present defendants should be entitled to take possession of said lands, alleging default, and by reason thereof the present defendants claimed possession, that the present plaintiff did not plead any defence to the action, and for default of any defence; on the 30th September, judgment for possession was recovered.

Held, that the judgment so recovered estopped the present plaintiff from now maintaining this action.

J. B. Clarke and *Stone*, for the plaintiff.

Muir and *Wallace Nesbitt*, for the defendants.

Divisional Court.]

TILL *v.* TILL.

Husband and wife—Wife living apart—Husband in possession of wife's land—Recovery of possession by wife—Claim for use and occupation.

Under the O. J. Act, s. 25, ss. 2, a judge sitting elsewhere than in a Divisional Court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court.

On the trial of an action the pleadings were admitted to state the facts, and what was called "a special case on the pleadings" was reserved for the opinion of the judges of this court. On the case coming before the Divisional Court it was held that the special case, as such, could not be entertained; but the application was

directed to be turned into a motion for judgment under rule 323, or on the pleadings and admissions under rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the lands in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for $2,000, which he expended in improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession and for use and occupation. No demand was made prior to service of the writ.

Held, following *Donnelly* v. *Donnelly*, 9 O. R. 673, that the plaintiff was entitled to possession, but she was only entitled to recover for the use and occupation since the service of the writ.

Held, also, that the defendant could not claim for the moneys expended on the land.

J. B. Hand, for plaintiff.

N. Murphy, for defendant.

Rose, J.]

REGINA *v.* EDGAR.

Canada Temperance Act, 1878—*Conviction for second offence—Enquiry as to previous conviction—Necessity for first dealing with subsequent offence, s.* 115—*Peremptory effect of—Certificate of previous connection—Mode of drawing conviction.*

Sec. 15 of the Canada Temperance Act, 1878, which provides for the case of a previous conviction, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted."

Held, that the language of the section is peremptory; and, therefore, to give a magistrate jurisdiction thereunder to enquire as to a previous conviction, he must first find the accused guilty of the alleged subsequent offence.

In this case, which was a conviction for a second offence, this was not done, and the conviction was therefore quashed.

Quære, whether a certificate of a previous conviction is sufficient *prima facie* evidence of the identity of the accused with the person of the same name previously convicted. Convictions should be drawn with care so as to specify that the offences are against the second part of the statute.

Aylesworth, for defendant.

Delamere, contra.

Rose, J.]

BOOK *v.* BOOK.

Probate—Validity of—Right to question.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate, by reason of the mode of proof and the invalidity of the will.

Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of a probate issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the court.

Irwin v. *Bank of Montreal*, 38 U. C. R. 375, followed.

Quære, whether the application must be to the Surrogate Court or not.

Lash, Q.C., for plaintiffs.

Moss, Q.C., contra.

Divisional Court.]

HEINTZMAN *v.* GRAHAM.

New trial—Weight of evidence—Costs.

Replevin for a piano delivered to defendant, as alleged by plaintiffs, under an agreement that the piano was received by defendant on hire for twenty-four months, at $5 a month, with right of purchase at $265—$15 cash and balance by instalment, and until the purchase money was paid, the piano to remain the plaintiff's property; that default was made in the payments, and that plaintiffs were entitled to take possession of same. The defendant stated that she purchased the piano, no mention being then made of the agreement, which was subsequently signed without defendant's

authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from defendant to sign, and also satisfaction by her. The jury found for the defendant.

The court, not being satisfied with the finding, directed a new trial with costs to the succesful party in the cause.

Delamere, for the plaintiffs.

D. O. Cameron and *F. McPhillips*, for defendant.

Falconbridge, J.]

ANGLO-CANADIAN CO. *v.* WINNIFRITH.

Copyright—Proof of copyright—Domicile—Right of benefit of statute—Knowledge of copyright—Costs—Damages.

Motion for an injunction to restrain defendants from importing and selling, or offering for sale, in Canada, certain musical compositions of which plaintiffs claimed the copyright. The evidence as to copyright was that of the plaintiffs' manager, who stated on affidavit that plaintiffs were a company incorporated under the English Companies' Act, for securing Canadian copyright in musical compositions, and to acquire the protection of the Canadian Copyright Act, 1875, having their registered office in London, Eng., and their Canadian office at Toronto, and stating in a schedule to his affidavit the names of the said compositions and the dates of copyright.

Held, that for the purposes of the injunction, there was sufficient evidence of copyright.

It was objected, on the hearing, that the plaintiffs' domicile was in England, and not in Canada; and therefore the plaintiffs were not entitled, under s. 4, to the benefit of the Act, and that by s. 32 it should have been shown that defendants imported the publications with knowledge of plaintiffs' right.

Held, that there was nothing in the objections as to domicile, for if they were assignees there, there was no restriction to the right to obtain copyright so far as domicile or citizenship was concerned; but, if they were the authors, then the domicile was in London, where the head office is, and that is certainly a part of the British possessions within the meaning of the Act. In either case the plaintiffs were entitled to the sole and exclusive right of publishing and vending the said works in Canada.

Held, also, that it was not necessary to show that the publications were imported with knowledge of plaintiffs' right, though that would be important on the question of costs and damages.

The defendants appeared to have innocently imported the books, and, on being made aware of the infringement by the service of the writ, expressed regret, and though they did not offer to undertake to discontinue the infringement, they stated in evidence that such was their determination.

Held, that the injunction must be granted, and had the defendants simply appeared on the motion, admitted the plaintiff's rights, and consented to the injunction, no costs would have been imposed, but as defendants had contested the plaintiffs' rights, and thus, to a certain extent, justified the plaintiffs' course, the plaintiffs were entitled to the costs.

Bain, Q.C., for the plaintiffs.

Hector Cameron, Q.C., for the defendant

Chancery Division.

Full Court.] [Dec. 21, 1887

SIMMONS *v.* SHIPMAN.

Title of possession—Successive occupiers without mesne conveyances.

Held, reversing the decision of O'CONNOR, J., that to bar the true owner, and to give a possessory title to land under the Statute of Limitations, the fact of actual possession is the material thing, and this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other, but it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances. It is not correct to say that whenever in an action for the possession of land the plaintiff seeks to show a title by length of possession by himself or those through whom he claims, he must in order to succeed be able to show a deed or writing from each former occupant or

possessor to the occupant or possessor next succeeding him, or inevitably fail in his action.

McMichael, Q.C., and *W. H. Jones*, for the plaintiff.

Britton, Q.C., for the defendant.

Practice.

Court of Appeal.] [May 11, 1887.

CITY OF TORONTO *v.* TORONTO STREET RAILWAY CO.

Appeal—Injunction—Staying operation of—R. S. O. c. 38, s. 27.

Held, that the operation of an injunction awarded by a judgment of the court below was stayed pending an appeal to this court, after the perfecting of the security on appeal, by virtue of R. S. O. c. 38, s. 27.

McCarthy, Q.C., for the appellants.

Robinson, Q.C., for the respondents.

Chy. Divisional Court.] [Dec. 2, 1887.

CLARRY *v.* BRITISH AMERICA ASSURANCE CO.

Reference—Ontario Judicature Act, s. 47—Actions on fire insurance policies—Accounts.

Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation and concealment of facts were raised upon the pleadings.

Held, that an order referring all the issues in the actions to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way.

Laidlaw, Q.C., and *Kappele*, for the plaintiff.

McCarthy, Q.C., and *Wallace Nesbitt*, for the defendants.

Chy. Divisional Court.] [Dec. 7, 1887.

WATT *v.* CLARK.

Settlement of action—Powers of solicitor—Instructions from client.

After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was, in the solicitor's opinion, a favourable one. The client said that he had instructed his solicitor not to settle in the way he did.

Held, that the defendant was entitled to have the verdict and udgment set aside, and a new trial on payment of costs.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

C. P. Divisional Court.] [Dec. 23, 1887.

DUNDAS *v.* DARVILL.

Interpleader—Liability for costs of execution creditor not contesting claim.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant in the event of the latter not succeeding in the issue.

Held, that the Corporation was not, under these circumstances, liable to contribute to the costs of the issue; but nevertheless was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods.

Aylesworth, for the Molsons' Bank.

Lash, Q.C., for the other execution creditors.

Mr. Dalton, Q.C.] [Dec. 30, 1887.

PARKER *v.* HOWE.

Attachment of debts—Dividends on insolvent estate.

A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a

dividend; and, before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.

Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made.

McCraney v. *McLeod*, 10 P. R. 539, explained and followed.

A. H. Marsh, for the judgment creditor.

Aylesworth, for the claimant.

Miscellaneous.

"WHAT made you steal that water-proof cloak?" demanded the judge. The culprit whispered: "I was trying to lay up something for a rainy day."

DELIVERY OF THE CONSIDERATION.—We have recently read of a deed in consideration of natural love and affection, the receipt of which is hereby confessed and acknowledged.

A RARE OCCURRENCE.—A barrister once said to Douglas Jerrold, in great indignation, "I have just met a scoundrelly barrister!' "What a coincidence," was the quick reply of the famous wit.

BURGLARY INVOLVES A BREAKING.—*Law Professor:* What constitutes burglary? *Student:* There must be a breaking. *Professor:* Then, if a man enters your door and takes five dollars from your vest pocket in the hall, would that be burglary? *Student:* Yes sir. Because that would break me.

A PERIPATETIC JUDGE.—Constable Hefferman went to arrest Jas. Walker, of Elderslie, who keeps a groggery on the roadside, five miles from Chesley. James took to the woods, and Patrick took after him. After a hot chase James surrendered, and was lugged along to the roadside, where police magistrate Vanstone sat in his buggy, calmly viewing the race. His Worship tried him on the spot, convicted him without the right of appeal, and fined him fifty dollars and costs. It is a great convenience to delinquents, thus to keep a travelling court.—*Ex.*

RURAL Magistrate—"Prisoner, you are charged with—ah—loitering about in a suspicious manner, without any ostensible employment. How do you obtain a living?" Prisoner—"Your Wusship, I'm engaged in the manufacture of smoked glasses for observing eclipses, an industry,"—(solemnly)—"an industry, your Wusship, which involves protracted periods of enforced leisure!" (Discharged with a caution.)

WOMEN AS JURORS.—In an after-dinner speech at a meeting of the Ohio Bar Association, Judge Harris, in speaking of whether women should not serve as jurors, said he had had experience. He had been an associate justice all through his married life. He came home once late at night with an important case upon his mind. His wife inquired what was worrying him. He replied that he was undecided in regard to a case, in which was involved a bank, and a pretty woman whom he knew. His wife at once replied that there was no question at all, the bank ought to have it. The judge thinks that the strong prejudices of ladies unfit them for acting as jurors.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for January 28th and February 4th contain Peasant Properties in France, 1787-1887, and Rome and Malaria, *National;* Manxland: its Laws and Customs, *Westminster;* The Time it Takes to Think, *Nineteenth Century;* Mademoiselle Aisse, and Right and Wrong, *Fortnightly;* Notes by a Naturalist, *Cornhill;* Wm. Powell Frith, R.A., *Temple Bar;* The Story of the Assassination of Alexander II., *Gentlemen's;* Pictures at Sea, *Macmillan's;* Philologists *versus* Critics, *English Illustrated;* Secret Chambers, an Unvarnished Picture of Peking, The Explosion at Amoy, and The Power and Speed of Flight in Birds, *St. James';* The Attractiveness of London, *Spectator;* Christmas Island, *Nature;* The Centenary of the Times, *Times;* with instalments of "Richard Cable," "Cass," and "Such Pity as a Father hath," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

MICHAELMAS TERM.

The following gentlemen were called to the Bar during Michaelmas Term, 1887, viz:—*Nov. 21st*—George Watson Holmes, Herbert Langell Dunn, Roderick James Maclennan, James Albert Page, Francis Foley Lemieux, Edward Holton Britton, Alexander Robert Bartlet, Robert James Leslie, Herbert Hartley Dewart, Robert Cleugh LeVésconte, D'Arcy de Lessert Grierson, William John Millican, George Filmore Cane, Horace Osmond Ernest Pratt, Richard Alexander Bayly. *November 22nd*—Abner James Arnold, William Percy Torrance. *November 26th*—William Arthur John Bell.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz:—*November 21st*—E. H. Britton, R. C. Le Vésconte, R. J. Maclennan, G. F. Cane, R. A. Bayly, G. R. O'Rielly, E. S. Wigle, E. A. Crease, A. F. May, G. J. Leggatt, R. H. Dignan, J. H. A. Beattie, E. Considine, A. D. McLaren, H. N. Roberts, H. Macbeth. *November 22nd*—A. Stevenson. *November 26th*—J. C. Grant, A. R. Bartlet, R. J. Leslie, G. W. Holmes, W. D. Gregory, W. A. J. Bell, G. A. Payne, J. P. Lawless, J. Y. Murdoch. *December 2nd*—W. P. Torrance, J. M. Quinn. *December 10th*—C. E. Weeks.

The following gentlemen passed the First Intermediate Examination, viz:—J. F. Orde, with honours and first scholarship; C. E. Burkholder, with honours and second scholarship; W. H. Hunter, with honours and third scholarship; A. Constantineau, with honours; and Messrs. J. Ross, D. Hooey, R. A. Widdowson, E. S. B. Cronyn, J. Webster, A. C. Sutton, M. Routhier, W. L. Morton, T. W. Horn, A. J. J. Thibodo, H. A. Simpson, A. H. Wallbridge, W. A. Smith, A. B. McCallum, J. F. O'Brien, C. Elliott, J. H. Hegler, J. Miller, H. W. Macoomb, W. P. McMahon, J. A. Ritchie, M. Scandrett, W. C. Smith.

The following gentlemen passed the Second Intermediate Examination, viz:—J. A. V. Preston, with honours and first scholarship; A. Collins, with honours and second scholarship; C. D. Scott, with honours and third scholarship; and Messrs. F. W. Carey, G. C. Gunn, W. E. Tisdale, R. G. Smyth, H. Harvey, R. L. Elliott, J. H. Hunter, R. M. Macdonald, C. McIntosh, J. F. Edgar, R. M. Thompson, J. F. Woodworth, C. A. Ghent, S. D. Lazier, W. G. Burns, H. Miller.

The following candidates were admitted as Students-at-law, viz:—*Graduates*—F. J. Fulton, J. J. Maclennan, T. B. Gash, J. McEwen, T. D. Law, J. F. Carmichael, C. B. Dupuis, W. Davis. *Matriculants*—A. E. Scanlon, H. T. Berry, J. E. Bird, W. J. Boland, W. I. Dick, W. Farnham, J. F. Jeffery, M. P. McDonagh, J. A. Oliver, R. S. Robertson, W. F. Scott, J. G. Shaw. *Juniors*—H. G. Hamilton, D. E. Stuart, G. A. Kingston, H. F. Gault, A. L. Malone, H. M. McConnell, J. F. McMaster, H. E. A. Robertson, T. H. Lloyd, T. W. McGarry, E. Harley, L. B. C. Livingstone, T. B. Martin. *Articled Clerk*—W. J. McCamon.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM
For 1888, 1889, and 1890.

Students-at-Law.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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THE consolidated rules which have been for some time past in preparation, do not appear to be yet ready for publication. Their operation has been stayed until the 1st March instant, but if any great changes have been effected, we trust their coming into force may be still further postponed, so as to give the profession some time between their publication and their coming into force to make themselves acquainted with the change.

WE regret to learn that Mr. Justice Proudfoot has been unwell lately. His Lordship's indisposition, we hear, has seriously affected his hearing, and rendered the satisfactory discharge of his judicial duties very difficult. It is rumoured that the learned judge has applied for leave of absence, and in the event of its being granted, the circuit assigned to him will be probably be divided between the other judges of the Chancery Division.

THE Chancellor, we understand, leaves for British Columbia on the 1st of March instant, to attend the sittings of the arbitration pending between the Canadian Pacific Railway Company and the Dominion Government respecting a claim of the Company for compensation for the defective construction of a part of the line built for the Government by Onderdonk & Co., and subsequently taken over by the Railway Company on its formation. His Lordship has been appointed one of the arbitrators, and expects to be absent until about the middle of the month.

THE Revised Statutes of Ontario, 1887, have now been in force for three months, and still they are not ready for general distribution. This is bad management, and though we are quite prepared to admit that the work of revision is an extremely difficult task, and one involving a good deal more than the application of paste and scissors as some seem to imagine, yet we do think that the bringing of the Revised Statutes into operation, and their publication, ought to be coincident. The delay in publication is due, we believe, to the non-completion of the tables showing where the statutes consolidated are to be found in the Revised Statutes. It is a great pity that this part of the work has not been pushed with greater energy. Copies of the Statutes without these tables have been distributed for the use of the members of the Legislative Assembly. We are glad to see that an index accompanies each volume; it might, however, with advantage have been a more exhaustive one. The indexes to the Consolidated Statutes and Revised Statutes have been more or less wretched affairs.

Audi alterem partem is a good saying, and especially so in a legal journal. The *Winnipeg Sun* makes a lengthy extract from the article of F. C. W. in our number for February 1, on the subject of "Legal Aspect of Disallowance in Manitoba,' and says that it "affords them satisfaction to see the provincial side of the question so clearly set forth in such a publication as the CANADA LAW JOURNAL." G. W. W. concludes the discussion in a replication contained in a letter which we publish in this number. There is not much more to be said about the question involved than has been recently given to our readers.

INSANITY IN ITS RELATION TO MARRIAGE.

PROPOSITION I.—The contract of marriage is an engagement between a man and a woman to cohabit with each other, and each other only.

Authorities: (1) *Harrod* v. *Harrod*, 1 K. & J. 4, 1854, per Page Wood, V. C.: "The contract itself, in its essence, independently of the religious element, is a consent on the part of a man and a woman to cohabit with each other, and with each other only. They are married if they understand (by the religious ceremony) that they have agreed to cohabit together, and with no other person." (2) *Durham* v. *Durham*, 10 P. D. 80, 1885, per Sir James Hannen: "It appears to me that the contract of marriage is a very simple one, which it does not require a high degree of intelligence to comprehend. It is an engagement by a man and a womau to live together and love each other as husband and wife to the exclusion of all others."

Illustration: M. H., the validity of whose marriage was at stake, was deaf and dumb; had never been taught to talk with her fingers, and could neither read nor write. She was very dull of comprehension, and only those intimately acquainted with her could make her understand their meaning. She did not know the value of money. The conduct of M. H. was, however, perfectly proper; there was nothing in her appearance or demeanour indicative of imbecility; she was living in the same house with married people before her marriage, understood their relationship, and accepted the duties of a wife in her own case. The marriage of M. H. is valid: *Harrod* v. *Harrod.*

PROPOSITION II.—Such an engagement cannot be entered into by any one who is at the time prevented by natural weakness of mind, or by improper circumvention or pressure, from understanding its nature and deliberately accepting its effects.

Authorities: (1) *Durham* v. *Durham*, 10 P. D., per Sir James Hannen, at p. 82: "I accept for the purposes of this case the definition (of soundness of mind) which has been substantially agreed upon by counsel, viz., a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. . . . A mere comprehension of the words of the promise exchanged is not sufficient; the mind of one of the parties may be capable of understanding

the language used, but may yet be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real appreciation of the engagement entered into." (2) *Hunter* v. *Edney*, 10 P. D., per Sir James Hannen, at p. 95: "The question which I have to determine is not whether the wife was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject." See, too, the language of the same learned judge in *Cannon* v. *Smalley*, *ibid*, at p. 96. (3) *Scott* v. *Sebright*, 12 P. D., per Mr. Justice Butt, at p. 24: "Whenever from natural weakness of intellect, or fear—*whether reasonably entertained or not*—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger."

Earlier obiter dicta implicitly overruled. (1) *Portsmouth* v. *Portsmouth*, 1 Hagg. E. R., at p. 359, per Sir John Nicholl: "Without soundness of mind there can be no consent—none binding in law. Insanity vitiates all acts." (2) *Hancock* v. *Peaty*, 1 P. & D. 335, 1867, per Lord Penzance: "The question here is one of health or disease of mind, and if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power."

Illustrations: (1) *Durham* v. *Durham*, 10 P. D. 80: This was an action brought by A to have his marriage with B declared null, on the ground of insanity. A and B were married on 28th of October, 1882, and at the date of the trial B was unquestionably insane. B was a shy girl of low intellectual powers, but had received an ordinary education, had acquired some accomplishments, had taken part in private theatricals, and had never been treated by her relatives as insane. She displayed a decided aversion to A, her future husband; but this was explained on the ground of a pre-attachment to another gentleman, and she made the arrangements for her marriage rationally and methodically. Declaration of nullity refused. (2) *Hunter* v. *Edney*, 10 P. D. 93: Action for declaration of nullity of marriage between A and B on the ground of B's insanity. The parties became acquainted in 1879, and on 16th of June, 1880, B accepted A as her husband. The marriage was fixed for 17th of March, 1881. On the 12th B wrote to put it off, and A found her troubled and excited. The marriage was, however, carried out as arranged. B refused to dress for church for some time, lay all night on her marriage bed in her clothes, and on the following morning asked her husband to cut her throat. A medical man was immediately called in, and pronounced B insane. Declaration granted. (3) *Cannon* v. *Smalley*, 10 P. D. 96: Here the parties were married 1st of January, 1884. B, whose capacity was in question, performed her usual duties till the day before marriage, and on 28th of December, 1883, had written a perfectly readable letter to A, the petitioner. The only evidence of her insanity before marriage was her dulness and reticence. On 11th of January, 1884, B was examined by Dr. Savage, and pronounced insane. Declaration refused. (4) *Scott* v. *Sebright*, 12

P. D. 21: "A, a young woman of twenty-two years of age, entitled to a sum of £26,000 in actual possession and a considerable sum in reversion, had become engaged to B, and, shortly after her majority, was induced by him to accept bills to the amount of £3,325. The persons who had discounted these bills issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health and reduced her to a state of mental and bodily prostration, in which she was incapable of resisting coercion and threats, and, being assured by B that the only method of avoiding bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office." The marriage was never consummated, and was followed by the immediate separation of the parties. Declaration granted.

PROPOSITION III.—Supervening insanity is no ground for the dissolution of a marriage.

PROPOSITION IV.—Supervening insanity is no bar to divorce proceedings on behalf of or against a lunatic husband or wife.

Authorities. (1) "On behalf of a lunatic husband" (*Parnell* v. *Parnell*, 2 Hagg. C. R. 169, 1814) "or wife." Query in *Mordaunt* v. *Mordaunt* (2 P. & D. 103, 109, 382, 2 Sc. & Div. Ap. 374) answered affimatively in *Baker* v. *Baker* (6 P. D. 12). (2) "Against a lunatic husband or wife," *Mordaunt* v. *Mordaunt* (*vide supra*).

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THE EXTRADITION OF CRIMINALS.

THE postponement by the United States Senate of the consideration of the proposed Extradition Treaty with Great Britain, is an event of some importance to Canadians. The Ashburton Treaty, with its limited list of extradition crimes, has for forty-five years served a useful purpose, but the usefulness of the new treaty, if we ever get it, will be greater than that of the old one only in so far as the list of extradition crimes is extended. It is not proposed to improve the Ashburton extradition stipulation in any other material particular, and therefore we may expect to see in the future, as we have seen in the past, the purpose of the treaty frequently defeated by technicalities raised by counsel and allowed by judges. It is proposed in this paper to inquire whether there is not some better way of dealing with the problem of which extradition treaties are supposed to furnish the solution.

Extradition proceedings fail so often on account of the difficulty of defining crimes, that one is tempted to ask why it should be thought necessary to embody a list of offences in such a treaty at all. Why not, if we must have a convention, agree with the United States that each country will hand over to the other any fugitive from criminal justice whose offence is technically a "crime" under the

aws of his own State? In Canada the Dominion Parliament defines "crime," and there is therefore with us substantial uniformity. It is not so with the United States. One State legislature may treat a certain offence as a crime, while another does not. In one State a certain act may be included by law under the term "forgery," while in another State the same act is excluded from its scope. Even in the same State what is a forgery now may not have been one when the Ashburton treaty was negotiated; and so of other offences.

It may be said that to give such scope to an extradition treaty would have the effect of including under its operation what are called "political offences." The answer is that "political crimes" may be specifically excepted, and that the right to decide whether an offence is "political" or not, must, in the last resort, rest with the Government of the country, which is asked to surrender a fugitive. There is a fair amount of common-sense agreement, tacit or explicit, between Great Britain and the United States, as to the distinction between political and other crimes. The Canadian Government never asked for the surrender of Louis Riel, though he was technically and undoubtedly guilty of the murder of Scott. Had John Brown escaped to Canada after the Harper's Ferry affair, no demand would have been made for his surrender, and if it had been made it would have met with the response that was subsequently given to the demand for the surrender of Bennett Young.

It is worthy of note that "political offences" are not mentioned in the Ashburton Treaty, nor is it there stipulated that a fugitive shall not be tried for any offence other than the one alleged as the basis of the demand for his surrender. The question whether a person extradited for one crime may properly, under the treaty, be tried for another, has been variously decided by courts, and variously pronounced upon by statesmen and jurists. The weight of authoritative opinion in both Great Britain and the United States seems to favour the theory that an extradited fugitive is entitled to his asylum as a kind of personal right, and that before he is apprehended on any new charge he should, whether tried or convicted on the extradition charge or not, be permitted to return to the place from which he was taken. This idea of the personal right of a criminal to a place of refuge seems to me a very absurd and mischievous one.* A fair construction of the Ashburton Treaty does not apparently warrant the view that by specifying seven offences for which a fugitive might be extradited, either the negotiators of the treaty or the governments which ratified it meant to limit the right of the recovering state to try the surrendered person for offences for which he could not have been extradited. We have the authority of President Tyler, who in 1842 submitted the Ashburton Treaty to the Senate, for saying that, "in this careful enumeration of crimes, the object has been to

* Chief Justice Taylor, of Manitoba, appears to have taken the same view of the matter in the Fant case (23 CANADA LAW JOURNAL, p. 422), while the opposite view was taken by Chief Justice Richards in the Burley case (1 CANADA LAW JOURNAL, p. 46), where he says: "When surrendered, I apprehend that the United States Government would, in good faith, be bound to try him for the offence upon which he is surrendered.

exclude all political offences or criminal charges arising from wars or intestine commotions," and that "treason, misprision of treason, libels, desertion from military service, and other offences of similar character, are excluded." The fact that President Tyler enumerates all varieties of "political offences" as intended to be excluded, seems to be warrant for contending that the treaty gave no guarantee of immunity of any kind to persons chargeable with non-extradition offences, that are at the same time non-political.

The presumption in favour of the criminal, as to his right of asylum after failure to convict him on the offence for which he was extradited, is a legal presumption, and is maintained by legal arguments. Akin to it is the assumption that because a government binds itself by treaty to deliver up to another government on requisition a person *prima facie* guilty of one of a list of crimes, it declares by implication that it will not deliver up persons *prima facie* guilty of other crimes when requested to do so. A government that is bound by treaty to surrender murderers, pirates, robbers and forgers, can, without being bound to do so, surrender burglars, swindlers, embezzlers and thieves. In this direction, and not to an extended list of extradition crimes, we must look for a solution of the difficulties caused by the criminals of Great Britain and Canada taking refuge in the United States, and *vice versa*. No treaty is necessary, and in fact a treaty is an obstruction, since the clearest and simplest of documents bristles with points on which subtle minds may raise technical obstacles to the extradition of criminals. All that is necessary is that each country should make a practice of surrendering to the other such of its criminals as it feels disposed to ask for, taking care only that (1) a *prima facie* case is made out against them, and (2) that they are not tried afterwards for political offences. Bad faith on the part of either government with respect to the latter point would justify the discontinuance of the practice of surrender. But on that score there is little ground for fear of trouble. Secretary Fish, in the correspondence growing out of the Winslow case in 1876, correctly describes the state of public feeling amongst English speaking people with respect to this matter, when he says:—

"Neither the extradition clause in the treaty of 1794, nor in that of 1842, contains any reference to immunity for political offences, or to the protection of asylum for religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guarantees were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

It may be objected that if Canada were to commence the practice of surrendering all criminals on requisition from the United States, the latter country might not be willing to return the favour. What then? The obvious answer is, that whatever view the United States may take of the value of Canadian criminals as citizens, it is clearly a good thing for Canada to get rid of as many United States criminals as possible. A large proportion of our malefactors, from murderers down to pickpockets come over to Canada to operate when the United

States has become too hot to hold them. They leave their own country for their country's good, and we should send them out of ours on the same principle. If we could, in addition to unloading on the United States all our bank-wreckers, swindlers and embezzlers, succeed in sending back to that country all its criminal refugees of the same class, we would have reason to congratulate ourselves on so desirable a riddance. Why should we let the "right of asylum" trouble us? We can always treat that right with respect whenever we choose to do so, but there is no reason for harbouring to our own detriment men who are wanted by our neighbours because they have committed crimes.

It would be out of the question for us to surrender alleged criminals in this way to any country with a civilization lower than our own. We could not give up men if we did not know that they would get a fair trial, that they would be considered innocent until proved guilty, that they would not be subjected to torture, and that they would not be crucified, or impaled, or put to death in some other barbarous fashion. We could not surrender alleged criminals to Russia, or Turkey, or China, even under an extradition treaty, without some guarantee that they would be fairly dealt with in accordance with the requirements of sound jurisprudence, and with the dictates of humanity. The best guarantee that they would be so dealt with in the United States is that the civilization of that country is practically identical with our own, that their methods of ascertaining the guilt or innocence of an accused person are very similar, and that there is a like degree of similarity in the penalties attached to crimes. Such a frank recognition by us of the equality of the United States would in all probability secure the voluntary surrender of such criminals as we might desire to convict and punish in this country, and thus bring about a condition of perfect free trade in criminals without the intervention of any treaty stipulations to hamper and restrict the process of extraditing them.

Though the tendency of legal opinion in the United States has long been towards a narrow view of extradition, yet it is not asserted that criminals must never be delivered up to foreign nations except under treaty provisions. If a surrender were made without the authority of a treaty it would be based on "comity." In the early history of the United States a sound and liberal view was taken of the subject by the government officials. In 1796, Mr. Pickering, Secretary of State, expressed his concurrence with Mr. Liston, then British Minister at Washington, in the opinion that "while the reciprocal delivery of murderers and forgers is expressly stipulated in the 27th article of our treaty with Great Britain, the two governments are left at liberty to deliver other offenders as propriety and mutual advantage shall direct." The same Secretary, in a letter to the Governor of Vermont, says: "The reciprocal delivery of murderers and forgers is positively stipulated by the 27th article of the treaty; the conduct of the two governments with respect to other offenders is left, as before the treaty, to their mutual discretion, but this discretion will doubtless advise the delivery of culprits for offences which affect the great interests of society." Chancellor Kent, in 1826, went much further than this, holding that "it is the duty of the government to surrender up fugitives on demand, after the civil

magistrate shall have ascertained the existence of legal grounds for the charge, and sufficient to put the accused on his trial." Kent based this view on the "law and usage of nations," which, he said, "rest on the plainest principles of justice." So late as 1864 President Lincoln surrendered a Cuban criminal to the government of Spain, with which country the United States had then no extradition treaty. The act was questioned in the Senate, and in reply to a request for information on the subject, the President sent a report prepared by Secretary Seward, on whose advice the surrender had been made. *Inter alia*, Mr. Seward said:—

"There being no treaty between the United States and Spain, nor any Act of Congress directing how fugitives from justice in Spanish dominions shall be delivered, the extradition in the case referred to, in the resolution of the Senate, is understood by this department to have been made in virtue of the law of nations and the constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race."

In a letter on the same case to the Chairman of the Judiciary Committee of the House of Representatives, Mr. Seward declared that "the object to be accomplished in all these cases is alike interesting to each government, namely, the punishment of malefactors—the common enemies of every society," and that "while the United States affords an asylum to all whom political differences at home have driven abroad, it repels malefactors, and is grateful to their governments for undertaking their pursuit and relieving us from their intrusive presence." This is precisely the view of extradition on which Canada and the United States should act without hampering themselves by any treaty on the subject, and if the United States declines to surrender our malefactors when we take the trouble for our own purposes to ask for them, we should nevertheless avail ourselves of every opportunity of sending across the border all the criminals that were wanted in the United States for punishment. Instead of conceding to criminals a right of asylum, we should regard it as a grievance when our neighbours do not offer to take back all their fugitive malefactors. It would be interesting to trace the origin and history of the above perverted view of "asylum," but such an inquiry is foreign to the subject before us.

WM. HOUSTON

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for January include 20 Q. B. D. pp. 1-147; 13 P. D. pp. 1-13; and 37 Chy. D. pp. 1-55.

ECCLESIASTICAL LAW—IMPRISONMENT OF CLERGYMEN FOR DISOBEDIENCE OF ORDER OF SUSPENSION—APPEAL—HABEAS CORPUS.

The case of *Ex parte Cox*, 20 Q. B. D. 1, so far as the main point involved in it, is happily of no practical interest in this province, it will therefore suffice to say that the decision of the Divisional Court noted *ante* vol. 23, p. 329, is now reversed by the Court of Appeal; and that the Court of Appeal held that s. 19 of the Judicature Act, 1873 (see Ont. J. A. s. 37), gives an appeal from orders made by the High Court on application for *habeas corpus*, whether the order grants or refuses the writ.

TRUST—TRUSTEE—LIEN OF TRUSTEE ON FUND FOR COSTS—VOID SETTLEMENT.

In re Holden, 20 Q. B. D. 43, although a bankruptcy case, involves a point of general interest, a settlor made a post-nuptial settlement, which was valid at the time it was made, under which the trustees incurred expense of defending an action brought by the settlor to set it aside, and which action was dismissed with costs, which were not paid. The settlor subsequently became bankrupt, and, by reason thereof, the settlement became void under the Bankruptcy Act. The trustees claimed a lien on the trust estate for the costs above mentioned, and it was held by the Divisional Court (Cave and A. L. Smith, JJ.) that as the settlement was originally valid, and the costs were incurred by the trustees in performance of their duty, they were entitled to the lien they claimed as against the official receiver.

ARBITRATION—ARBITRATORS' REMUNERATION—RIGHT TO SUE FOR.

Crampton v. *Ridley*, 20 Q. B. D. 48, is chiefly to be noticed, not for the point actually decided, but for the expression of opinion it contains as to the right of arbitrators and umpires to whom a mercantile dispute is referred for arbitration, to sue for a reasonable remuneration for their services upon an implied contract on the part of the parties to the reference to pay the same. Upon this point, notwithstanding some earlier authorities which appear to lead to a contrary view, the learned judge was of opinion that if the point ever came up for adjudication, it would be found that the law would imply a contract to pay for such services, though not where the matter in dispute was one among friends, upon social or such like matters, and referred to mutual friends of the parties for settlement.

JUSTICES—DISQUALIFICATION—INTEREST—BIAS.

The Queen v. *Farrant*, 20 Q. B. D. 58, was an application to set aside an order of Kekewich, J., for a prohibition to the defendant, a magistrate, to prohibit him from sitting to hear and determine an assault case on the ground of alleged bias or interest. The application was granted by Stephen, J., and the case will be

found useful for the discussion it contains as to the ground of disqualification of justices on the score of interest or bias. The grounds of disqualification assigned were: (1) that Mr. Farrant had acted as medical attendant of one of the parties assaulted; (2) that he had advised a settlement; (3) that he had offered to bet that the case would be dismissed by the magistrates; (4) and that he would be required as a witness. The first and second grounds assigned were held not to constitute any disqualification; the third ground was also held to be no disqualification, though if he had actually made the bet, it was held that he would have had a pecuniary interest which would have disqualified him. The fourth ground was held also to be no disqualification, but a matter within the discretion of the magistrate. The mere fact that a judge is subpœnaed as a witness it was held could not on principle disqualify him from acting, otherwise a door would be opened which might enable parties to indefinitely postpone the trial of cases.

PRACTICE—CONTEMPT OF COURT—ABUSIVE LANGUAGE AND THREATENING GESTURES TO SOLICITOR AFTER HEARING OF APPLICATION IN CHAMBERS.

In re Johnson, 20 Q. B. D. 68, was an appeal by a solicitor from an order of Kekewich, J., committing him for contempt of court. The contempt consisted in abusive language addressed by the appellant to another solicitor in reference to an application to a judge in chambers. The abusive expressions were accompanied by threatening gestures, and were used by the appellant towards the other solicitor while in the passages leading to the exit from the court. The Court of Appeal held that the order had been rightly made, and dismissed the appeal.

DAMAGES—BREACH OF WARRANTY—SUB-SALE—COSTS OF DEFENDING ACTION BY SUB-VENDEE FOR BREACH OF WARRANTY.

The sole point in question in *Hammond* v. *Bussey*, 20 Q. B. D. 79, was the right of the plaintiffs, who brought the action for a breach of warranty, to recover as part of their damages the costs incurred by them in defending an action brought against them by certain sub-vendees to whom they had sold the goods with a similar warranty to that of defendant. The defendant was notified of this action, and claimed that the goods were according to contract, the present plaintiffs therefore defended the action and were defeated. The present defendant submitted to pay the damages recovered in that action, but contended he was not liable for the costs. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) affirming Field, J., held that he was. These costs it was considered might reasonably be supposed to have been a part of the damages in the contemplation of the parties as the probable result of a breach of the contract, within the rule laid down in *Hadley* v. *Baxindale*, 9 Ex. 341.

SHERIFF—UNDER-SHERIFF—VACANCY OF SHRIEVALTY—LIABILITY OF UNDER-SHERIFF FOR PROCEEDS OF EXECUTION—3 GEO. I. C. 15, S. 8 (R. S. O. C. 16, S. 43).

The Gloucestershire Banking Co. v. *Edwards*, 20 Q. B. D. 107, was an action brought by an execution creditor for money had and received, against the per-

sonal representatives of a deceased under-sheriff, who, during the vacancy of the shrievalty, under 3 Geo. I. c. 15, s. 8 (see R. S. O. c. 16, s. 43), had acted as sheriff and received the proceeds of an execution. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) affirming the Divisional Court of the Queen's Bench Division (Day and Wills, JJ.) 19 Q. B. D. 575, held that the defendants were liable.

BILL OF SALE—SPECIFIC DESCRIPTION OF CHATTELS.

In *Witt* v. *Banner*, 20 Q. B. D. 114, the Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) affirmed the judgment of Wills and Grantham, JJ., 19 Q. B. D. 276, noted *ante* vol. 23, p. 306, and held that "450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water colours in gilt frames, 20 water colours unframed, and 20 gilt frames, at 47 Mortimer street," was not a sufficient description of chattels in a bill of sale.

MARRIED WOMAN—COMMITTAL FOR NON-PAYMENT OF DEBT—MARRIED WOMAN'S PROPERTY ACT, 1882, S. 1, SS. 2; (47 VICT. C. 19, S. 2, SS. 2 (O.).)

Scott v. *Morley*, 20 Q. B. D. 120, is another case throwing light on the meaning and effect of the Married Woman's Property Act, 47 Vict. c. 19, s. 2, ss. 2 (O.). A motion was made in that case to commit a married woman, against whom judgment had been recorded under the corresponding English Act, for non-payment of the judgment debt, but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.), reversing Kekewich, J. (before whom, however, the point raised by the appeal was not taken), held that no personal liability was incurred by a married woman against whom a judgment was recovered by virtue of the Married Woman's Property Act of 1882, and therefore she was not liable to committal for non-payment.

RAILWAY, BUILDING BY—LANDS INJURIOUSLY AFFECTED—COMPENSATION.

The points decided in *The Queen* v. *Poulter*, 20 Q. B. D. 132, are important. The question involved, was the right of a lessee to compensation under the following circumstances:—A railway, in the exercise of its statutory powers, commenced to build a warehouse which was intended to be one hundred feet high. If the warehouse had been actually built to the proposed height, it would have injuriously affected the light of a warehouse whereof the claimant was lessee for an unexpired time of fourteen years, which could be determined by six months' notice on 11th November next. The lessee gave notice to the railway company, and required them to say whether they would take over the lease, or whether he should give notice to determine the tenancy. The company refused to interfere, and the claimant then, of his own motion, gave notice to determine the tenancy. There was no evidence that at this time the railway company's building had so far progressed as to affect the light of the claimant's warehouse. The claimant afterwards claimed compensation from the company for injuriously affecting his lands. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) held, reversing the Queen's Bench Division, that the act of the claimant

in giving notice to terminate his lease, not being the natural result of the acts of the company, he could not recover compensation on the footing that he was entitled to a fourteen years' lease, and that he could not recover compensation in respect of an injury which was merely prospective, and which did not exist at the time of making the claim. Compensation was allowed on the footing of the claimant having a lease only up to the 11th November, when he terminated it by notice.

COUNSEL—CONDUCT OF ACTION—COMPROMISE.

Matthews v. *Munster*, 20 Q. B. D. 141, is a case to which we have already referred. See *ante*, p. 2. The facts were shortly these: On the trial of an action for malicious prosecution, the defendant's counsel, in the absence of the defendant, and without his express authority, consented to a verdict for £350 with costs, upon the understanding that all imputations against the plaintiff were withdrawn. On this being communicated to the defendant, he repudiated the compromise, and now moved the court to set it aside and for a new trial; but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.), affirming the Queen's Bench Division, refused the motion, holding that the relationship of counsel and client is not merely that of principal and agent, but that counsel, so long as his authority is unrevoked, has, subject to the control of the court, an "unlimited power to do that which is best for his client."

ADMINISTRATION — ADMINISTRATION DE BONIS NON — GRANT TO LEGATEE WITHOUT CITATION OF RESIDUARY LEGATEE.

Only two of the cases in the Probate Division seem to call for notice here. The first is *Re Wilde*, 13 P. D. 1. This was an application for administration *de bonis non*, by a specific legatee, in which it appeared that the residuary legatee, who was resident abroad, had notice by a letter that representation of the estate was required, and suggestion that he should renounce, to which he had made no reply; and it also appearing that he had no beneficial interest, there being no residue, it was held that the grant might be made without requiring the residuary legatee to be cited, or to renounce.

WILL—MISTAKE IN TRANSCRIBING DRAFT WILL—WILL ALTERED BY COURT TO CORRESPOND WITH DRAFT.

Re Bushell, 13 P. D. 7, strikes us as a somewhat curious case. Upon a will being propounded for probate whereby the testator had bequeathed a legacy to the "British Royal Infirmary," it was shown by affidavits that the legacy in the draft of the will was to the "Bristol Royal Infirmary." This draft had been read over to the testator and executed by him, and subsequently the engrossment had been executed by him without being read over. And, subject to an affidavit being produced that there was no such institution as the "British Royal Infirmary," the court granted probate of the will with the word "Bristol" substituted for "British."

WILL—HOLOGRAPH CODICIL—ATTESTING WITNESS UNABLE TO RECOLLECT EXECUTION—PRESUMPTION—PROBATE.

Woodhouse v. *Balfour*, 13 P. D. 2, is a case in which the witnesses to the signature of a testator to a holograph codicil, which appeared on its face to have been duly executed and attested, upon being called to prove it, while acknowledging their signatures as witnesses, were unable to recollect having written them, or of having seen the will or codicil before. They were clerks in the testator's employ, and had frequently witnessed papers for him. Under these circumstances the court presumed the codicil to have been duly executed, and granted probate of it.

COMPANY—EXTRAORDINARY GENERAL MEETING—IRREGULARITY IN CALLING BOARD MEETING—DIRECTOR, REMOVAL OF—AGREEMENT PRIOR TO FORMATION OF COMPANY, ADOPTION OF.

Proceeding now to the cases in the Chancery Division, *Browne* v. *La Trinidad*, 37 Chy. D. 1, covers some important points of company law. A meeting of directors passed a resolution for calling a general meeting, at which were to be proposed special resolutions for removing the plaintiff from the office of director, and for increasing the capital. The plaintiff was not notified of this meeting of directors until ten minutes before it was held, and was not then notified of the business intended to be transacted at it, and did not attend it. The general meeting was duly called in pursuance of the resolution for the 12th, for the adoption of the resolutions; and for 28th October for the ratification of the resolution adopted on the 12th October. On the 8th October, the plaintiff commenced the present action against the company and his co-directors, claiming *inter alia* a declaration that the extraordinary meeting had not been duly called for the 12th October, because of the alleged irregularity in calling the meeting of directors, and also an injunction restraining the defendants from removing him from his directorship, on the ground that prior to the formation of the company, it had been agreed by the promoters with the plaintiff, who was vendor of the corporate property, that plaintiff should be a director of the intended company irremovable until after the year 1888, and that this agreement had been embodied in the articles of association and adopted by the company having passed a resolution inviting the plaintiff to join the board as a director pursuant to the agreement. Charles, J., had granted an injunction on the ground of the insufficiency of notice in calling the meeting of directors; but the Court of Appeal (Cotton, Lindley and Lopes, L.L.J.) were of opinion that even though the meeting of directors was irregularly called, and might have entitled the plaintiff promptly to have insisted on another meeting being called, yet as he had not chosen to do so, the meeting was not so called as to be unable to act as a board, and therefore the general meeting was not irregularly called. And on the main point, on which Charles, J., did not pronounce an opinion, they held that the incorporation of the agreement into the articles of association merely amounted to a contract between the members of the company *inter se*, and was not an adoption of the contract between the company and the plaintiff. Doubt was also expressed whether an agreement not to remove a director was one that could be specifically enforced at the suit of the director.

PRACTICE—APPEAL AFTER TIME.

In re Clayton Mills Manufacturing Co., 37 Chy. D. 28, an order had been made requiring six directors to refund certain moneys which had been paid to three of these directors out of the assets of the company, liberty being reserved to the three who had not received the money to apply as to the liability of those who had. Three of the latter on the last day entered an appeal, and this was an application by the other three for leave to appeal also, which was granted; otherwise, as Lindley, L.J., put it, there might have been this paradoxical result, if the first appeal succeeds, that the persons who *prima facie* are primarily liable might get off, while the persons who *prima facie* are only secondarily liable would have to pay.

SETTLEMENT—VOLUNTARY CONVEYANCE—SETTLEMENT BY WIDOWER IN FAVOUR OF ISSUE OF A FORMER MARRIAGE—27 ELIZ. C. 4.

In re Cameron and Wells, 37 Chy. D. 32, it was held by Kay, J., that where a widower on a second marriage makes a settlement of his property wherein limitations are contained in favour of his issue by his former wife, such limitations are voluntary, and are void as against a subsequent purchaser for value. The learned judge held that the contrary principle laid down as regards settlements by widows in *Newstead* v. *Searles*, 1 Atk. 265; 9 App. Cas. 320 (a principle which the learned judge says he does not profess to understand), should not be extended to settlements made by widowers.

VENDOR AND PURCHASER—VENDORS AND PURCHASERS ACT—JURISDICTION—NOTICE TO RESCIND CONTRACT, VALIDITY OF—(R. S. O. 1887, C. 112.)

Jackson & Woodburn, 37 Chy. D. 44, was an application to North, J., under the Vendors and Purchasers Act (see R. S. O. 1887, c. 112, s. 3), to determine whether a notice to rescind the contract was valid or not. The Act, it may be remembered, enables all questions arising out of or connected with the contract ("not being a question affecting the validity or existence of the contract") to be disposed of by a judge on a summary application. The point which North, J., had to decide was whether the question submitted did or did not fall within the exception. On this point he says: "I think that, according to the true construction of section 9" (R. S. O. 1887, c. 112, s. 3), "the words of exception refer to the existence or validity of the contract in its inception, and do not preclude the court from deciding upon a summons the validity of a vendor's notice to rescind the contract. The question whether a power to rescind has been well exercised has often been decided by the court upon a summons under this section. *In re Dames and Wood*, 29 Chy. D. 626, is one of such cases." On the merits he held that the notice to rescind was valid.

LEGACIES CHARGED ON REALTY—LEGATEE, RIGHT OF, TO ACCOUNT OF BACK RENTS FROM DEVISEE IN POSSESSION.

Garfitt v. *Allen*, 37 Chy. D. 48, is another decision of North, J. The point in issue was whether a legatee, whose legacy is charged upon land, is entitled to

an account of back rents against the devisee, who has been in possession, when the land is insufficient to satisfy the legacies. The learned judge held that a legatee in such circumstances stands in no higher position than a mortgagee who has not entered into possession, and therefore that he was not entitled to the account of the back rents.

AUCTION—FICTITIOUS BIDDING BY STRANGER—SALE BY COURT—SETTING ASIDE SALE—TEXT-BOOKS AS AUTHORITIES.

Union Bank v. *Munster*, 37 Chy. D. 51, was an action brought for specific performance of a contract for the purchase of certain land which had been offered for sale under the order of the court in a mortgage action. The defence was, that a stranger had at the auction made, at the instigation of the mortgagor, a fictitious bid, whereby the defendants had been induced to bid a higher price than they otherwise would have done. Kekewich, J. held this was no defence, and in the course of his judgment makes some noteworthy remarks on the citation of text-books as authorities. The argument of the defendants' counsel was mainly based on a passage in Fry on Specific Performance, and he says: "It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in court. I mean, of course, text-books by living authors, and some judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author himself. I cannot forbear from quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous, the notion I mean that they possess a *quasi* judicial authority,' and then he gives a reason which must commend itself to all students why that notion is erroneous."

Reviews and Notices of Books.

Acts of the Legislatures of the Provinces now comprised in the Dominion, and of Canada, which are of a public nature, and are not repealed by the Revised Statutes of Canada for the reasons set forth in Schedule B to the said Revised Statutes.

In the paper respecting the Revised Statutes of Canada, signed "W.," and printed in the number of this journal published on the 1st of June, 1887, after giving an account of the inception and completion of that work, and its contents, and of the schedules appended to it, and their use in connection with it, we referred more especially to schedule B, headed: "Acts and parts of Acts, of a public general nature, which affect Canada, and have relation to matters not within the legislative authority of Parliament, or in respect to which the power

of legislation is doubtful, or has been doubted, and which, in consequence, have not been consolidated; also Acts of a public nature which, for other reasons, have not been considered proper Acts to be consolidated." The Commissioners were, by their commission, directed to "note the enactments of the old Provincial Statutes which have been repealed or altered; and also to classify all unrepealed enactments according to their subjects, care being taken to distinguish those applying to one or more Provinces only;" and they did so, and ascertained what enactments in the said Statutes were clearly in force, and related to subjects now under the jurisdiction of the Dominion Parliament, or as to which the jurisdiction was doubtful; and we stated that when such Provincial enactments related to matters forming the subject of a chapter of the Revised Statutes, they were printed with such chapter, but were made separate sections, and the Province or Provinces to which alone they apply were distinctly indicated; but if they related to matters with respect to which there was no chapter in the Revised Statutes, or the question of jurisdiction was doubtful, they were not printed in that work as then distributed, but only referred to in Schedule B, annexed to it, and left to be printed with the others referred to in the heading to that schedule, in a third and separate volume, which is now printed and distributed, and is that of which the title forms the heading of this article. It contains all the Provincial Acts or enactments on subjects within the jurisdiction of the Dominion Parliament, or as to which its jurisdiction or that of a Provincial Legislature is doubtful, or has been questioned, which are still in force in the Provinces by the Legislatures whereof they were respectively enacted (including those of the Civil Code of Lower Canada, now the Province of Quebec,)—except such as are incorporated as above mentioned in the Revised Statutes, Vols. 1 and 2, in the chapters on the subjects to which they relate.

This third volume is, in some respects, the one which was most needed. Every lawyer, and indeed every man of business in the Dominion, requires occasionally to know not only the statute law in force in the whole of the Dominion, but that in force in some one or more Provinces. That applying to the whole Dominion was to be found in its Statutes, of which most lawyers have a complete copy, while few have copies of the Statutes of all the Provinces. Yet lawyers, bankers, merchants and men of business in any Province are constantly becoming interested in questions affected by the statute law of other Provinces, as, for instance, those relating to bills of exchange, carriage of goods on inland waters, and many other subjects. These Provincial enactments will now be found in one or other of the three volumes prepared by the Commissioners. And still more important will be the volume now before us to the legislator wishing to amend and consolidate the law on any subject, and make it uniform throughout the Dominion. The third volume contains also the Public General Acts of the Dominion Parliament in force at the time of the publication of the Revised Statutes, but which, as being of a temporary nature, or for other reasons, were not considered proper Acts for consolidation.

Some idea of the extent, value and efficiency of the work performed by the

Commissioners may be formed from the following brief summary of the contents of the volume now before us, viz.:—

Acts of the late Province of Canada (Upper and Lower Canada united) prior to the Consolidated Statutes of 1859—13 Acts, 87 pages.

Acts forming part of the Consolidated Statutes of the Province of Canada—8 Acts, 92 pages.

Acts forming part of the Consolidated Statutes for Upper Canada—13 Acts, 68 pages.

Acts forming part of the Consolidated Statutes for Lower Canada—9 Acts, 51 pages.

Acts of the late Province of Canada, after the Consolidated Statutes of 1859, including parts of the Civil Code of Lower Canada—25 Acts, 155 pages.

Acts of Nova Scotia, Revised Statutes, third series—15 Acts, 40 pages.

Act of Nova Scotia prior to the Revised Statutes, third series—1 Act, 5 pages.

Acts of Nova Scotia subsequent to the Revised Statutes—5 Acts, 7 pages.

Acts of New Brunswick, Revised Statutes—15 Acts, 34 pages.

Acts of New Brunswick prior to the Revised Statutes—3 Acts, 17 pages.

Acts of New Brunswick subsequent to the Revised Statutes—22 Acts, 37 pages.

Act of British Columbia, (Colony of Vancouver Island)—1 Act, 2 pages.

Acts of former separate Colony of British Columbia—2 Acts, 4 pages.

Acts of British Columbia after the union of the two Colonies—11 Acts, 33 pages.

Acts of Prince Edward Island, Revised Statutes (20 Geo. 3)—24 Acts, 77 pages.

Acts of Prince Edward Island after the Revised Statutes—6 Acts, 12 pages.

Acts of the Parliament of Canada—153 Acts, 450 pages.

In all, 328 Acts and 1,171 pages.

The Acts in this volume are printed as in the two preceding it, each Act separately and with the Royal arms and the imprint of the Queen's Printer, so that he can furnish copies of any required Acts or number of Acts; or the Acts relating to any subject or class of subjects can be taken out of the volume and bound or stitched separately. A table of contents with the full titles of every Act is prefixed, and a copious index appended. The Acts of the Parliament of Canada inserted are, of course, to be found in the Statutes at large, but they are there dispersed through twenty-one volumes instead of being included as now in part of one; a point of no small convenience. The Acts in this volume are all of great public importance, though not of the same general character and extent as those revised and consolidated in the two preceding volumes. Those of the late Province of Canada of course apply to Quebec and Ontario, which then formed that Province, unless expressly limited to only one of them. They include those articles of the Civil Code of Lower Canada (now Quebec) made statute law by the Act 29 Vict. c. 41, the subjects of which were mentioned in the paper in our number for the 1st of June, 1887, and one more which the Commis-

sioners found necessary to the understanding of one of those we mentioned. These articles are given in full, and will be found exceedingly interesting and important, for the reasons assigned in our last paper, to which we confidently refer. They are well and clearly drawn by a Commission comprising three of the ablest lawyers in Canada, and are unquestionable law in the Province of Quebec, and must often affect the rights and interests of merchants, bankers and others in other parts of the Dominion.

The volume before us has added to the obligations under which the Dominion lies to the Commissioners for the manner in which their important, laborious, and difficult work has been done.

SUMMARY.

The Public General Acts of the Parliament of the Dominion of Canada requiring consolidation have been consolidated, and will be found in Vols. 1 and 2; and those which for reasons before mentioned did not require consolidation will be found in Vol. 3, pages 722 to 1171.

The Acts and enactments of Provincial Legislatures, in force in the Provinces by the Legislatures of which they were passed, and relating to matters forming the subjects of chapters in Vols. 1 and 2, will be found in such chapters respectively (but clearly distinguished as applying to such Provinces only),—except those from the Civil Code of Lower Canada (now Quebec), which are in Vol. 3, pages 393 to 440.

Those which are not so inserted in Vols. 1 and 2, and those from the said Code, will be found in Vol. 3, pages 1 to 721.

The Acts and enactments in Vol. 3, from the Consolidated Statutes of Upper Canada, and those from the Statutes of the Maritime Provinces and British Columbia, are translated and published for the first time in French.

W.

Correspondence.

DISALLOWANCE.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—In the number of the CANADA LAW JOURNAL for February 1st, F. C. W., dating from Winnipeg, says that I was wrong in the conviction I expressed in my contribution to your preceding number, that the Dominion Government were bound to use every legal means in their power to give effect to their contract with the C. P. R. Company, confirmed by the Act 44 Vict. c. 1, declaring that it should "have effect as an Act of the Parliament of Canada." But I can find in his paper no reason for changing the opinion I then expressed, or the statement with which I concluded that "there is no doubt that Parliament by the said Act grants and intended to grant the twenty year monopoly, and that it was part of the consideration for which the company undertook to make the railway, and made it:" and if the line of the C. P. R., as defined in the Act 37 Vict. c. 14, passes, as I believe it does, through old Manitoba, it is clear that the monopoly clause applies to it.

I will not take up your space in arguing the question as to the right of a Province, under the B. N. A. Act, to authorize the construction of a railway *to* the national boundary line. I expressed my doubt modestly, and gave my reasons for it. Though I respect the judgment of the chief justice and Supreme Court of New Brunswick, in the case before them, I think they would not have given the same judgment in the case of a railway constructed in avowed contravention of the expressed will and intention of Parliament, and of the contract it had approved and confirmed as its Act. If I am wrong in so thinking, my error does not affect my position that the promise and pledged faith of the Government and Parliament of Canada must be kept. Parliament would *authorize* the construction of a railway if it permitted Ministers to allow it. I earnestly wish that the monopoly complained of should cease, with the consent of the company, on fair compensation to them, if thereby they sustain loss; and I have always thought that every possible facility should be given to Manitoba and the North-West Territories in consideration of the disadvantage at which they are placed by their very great distance from the sea-board, and have wished that the Finance Minister could see his way to some abatement in the duties on goods imported by sea for, and conveyed directly to, them, from the port of entry, in consideration of the heavy expense of their transport. I thank F. C. W. for giving me the opportunity of saying this, and for his correction of the misprint of s. 94 for s. 92 of the B. N. A. Act. It was corrected in the copy printed in the Montreal *Legal News*.

Yours, etc.,

G. W. W.

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

THE Second Annual Meeting of the County of York Law Association was held in Convocation Hall at Osgoode Hall, on Monday the 6th of February, Mr. B. B. Osler, Q.C., in the chair. There was a large attendance of members.

The following report was then read to the meeting :—

To the Members of the County of York Law Association—

GENTLEMEN : The Trustees take pleasure in reporting that the affairs of the Association are in a very satisfactory condition, that the purposes laid down in the Memorandum of Incorporation are being accomplished, and that the Association lends a mode of promoting the general interests of the profession, which is of singular value.

At the last Annual Meeting a resolution was passed directing the Board to take measures to bring about a meeting of delegates of the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession, and immediately after the meeting correspondence was opened with the view of bringing about such a conference.

Before, however, the details of this arrangement had been completed, the draft of the proposed Revised Rules was laid before the Committee on Legislation, and this draft contained so many features requiring careful consideration, that the Committee on Legislation of the Hamilton Law Association was invited to meet with our Committee, and take up the consideration of the draft Rules. This Joint Committee met, and was subsequently enlarged by inviting all the other Law Associations in the Province to send representatives to the meetings. Most of the other Associations were represented at the subsequent meetings of the Committee ; and ultimately a report was made, setting forth the suggestions of the Committee, the details of which are, without doubt, well known to the members of this Association.

The result of the labours of this Committee has been recognized and freely adopted by the judges and by the Attorney-General, and the report has been recognized as fairly representing the opinions of the profession on the subject of the new Rules. The Trustees, in giving prominence to the work of the Committee, desire to point out that had it not been for the existence of the Law Associations it would have been impossible to obtain any representative expression of opinion from the Bar of the Province, nor could expression have been given to an opinion from the Bar which would have carried the weight the report of the Joint Committee admittedly bore.

One of the principal features proposed by the Joint Committee provided for fixing definitely the mode of trial before trial. On no point were opinions so strongly and vigorously expressed as upon this, and as the solution, a very strong recommendation was made to take away the absolute discretion of the trial judge.

Almost as strong was the recommendation to establish a permanent circuit list for the trial of all cases in the High Court, with the necessary rearrangement of the sittings of the Divisional Courts. While we feel gratified that the judges have so far recognized the labours of the Committee as to have adopted nearly all their suggestions, we regret that in framing the Rules they have not adopted either of these recommendations, which the Trustees now lay before the Association for consideration.

The Trustees have aided so far as they could in urging upon Parliament the important question of raising the judicial salaries, which are now most inadequate, and it is earnestly to be hoped that the efforts made in this direction may meet with some measure of success.

The present efficient state of the library is due to the labours of the librarian, whose systematic plan of keeping the reports noted up has proved most valuable, especially at *Nisi Prius*. No book has ever been lost from the library.

The daily attendance in the library is large, and its usefulness is now well recognized. 159 volumes have been added during the year.

Two members of the Association, Mr. W. G. Falconbridge, Q.C., and Mr. Hugh MacMahon, Q.C., were promoted to the Bench during the year.

The Trustees have to record, with regret, the death of one member during the year, Mr. G. D'Arcy Boulton, Q.C.

At the date of the last Annual Report the Association numbered 216 members. Forty-four new members have subscribed for stock during the year. One member, Mr. Allan McNab, has withdrawn from the Association. There are now 256 members of the Association.

Two further donations of portraits have been promised to the Association, one by Mr. Ritchie, Q.C., and the other by Mr. Shepley, and it is hoped that members of the Association will contribute, from time to time, portraits of the judiciary of the Province.

The Historian of the Association hopes soon to publish his "Lives of the Judges."

The particulars required by the By-Laws accompany this report, being—

1. The names of the forty-four members admitted during the year.
2. The names of the 256 members at the date of this report.
3. A list of the books contained in the library.
4. A list of books added to the library during the year.
5. A list of periodicals received during the year.
6. A detailed statement of the assets and liabilities of the Association at the date of the report, and of receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be submitted to you for your approval.

A copy of the Report of the Inspector of County Law Libraries upon the library of this Association accompanies this report.

B. B. OSLER, *President.*
WALTER BARWICK, *Treasurer.*

December 31, 1887.

On the motion of Mr. Barwick, seconded by Mr. Moss, Q.C., the report was adopted.

The Auditor's Report was then read to the meeting by Mr. Nicol Kingsmill.

STATEMENT FOR THE YEAR ENDING 31ST DECEMBER, 1887.

DR.			CR.	
FOLIO.			FOLIO.	
	Due Carswell & Co., 31st Dec., '87	$691 91	Balance of Cash on hand Dec. 31st, 1886	$720 06
23.	Reports and Statutes	361 70	1. Stock Subscriptions	220 00
29.	Text-Books	300 00	5. Annual Fees	505 00
33.	Periodicals and Subscriptions to Gazettes and Annual Reports and Digests	139 25	15. Annual Grant from the Law Society	433 00
37.	Binding	82 50	21. Carswell & Co., balance account remaining unpaid	232 61
41.	Furniture	10 50	141. Interest on Bank Deposits for 1886	39 20
43.	Salaries, Printing, Expenses, etc.	476 28		
	Balance on hand (exclusive of $7.90 interest, 1887)	87 73		
		$2,149 87		$2,149 87

STATEMENT OF ASSETS AND LIABILITIES ON THE 31ST DECEMBER, 1887.

ASSETS.		LIABILITIES.	
Reports and Statutes	$2,760 66	Stockholders	$1,305 00
Text-Books	984 77	Carswell & Co.	232 61
Periodicals	238 75	Profit and Loss Account	2,589 85
Furniture	55 55		
Cash in Bank (exclusive of $7.90 interest for 1887)	87 73		
	$4,127 46		$4,127 46

PROFIT AND LOSS ACCOUNT, 1887.

DR.		CR.	
Expenses	$476 28	Balance, 31st December, 1886	$2,088 93
Balance	2,589 85	Annual Fees	505 00
		Law Society	433 00
		Interest	39 20
	$3,066 13		$3,066 13
		Balance	$2,589 85

Toronto, December 31, 1887.

WALTER BARWICK, *Treasurer.*

The undersigned beg to report that they have examined the books, accounts and vouchers of the Treasurer, and find the above report correct.

NICOL KINGSMILL,
N. GORDON BIGELOW, } *Auditors.*

On the motion of Mr. Kingsmill, seconded by Mr. John Hoskin, Q.C., the report was adopted.

On the motion of Mr. Barwick, seconded by Mr. Ritchie, Q.C., the following amendment to the thirty-fourth by-law was adopted: "The payment by a Barrister or Solicitor subscribing for a share in the Association shall cover his annual fee for the current year."

On the motion of Mr. Marsh, seconded by Mr. John Hoskin, Q.C., the following resolution was adopted: "That the Joint Committee on Legislation be requested to interview the judges and the Attorney-General, and urge upon them, and, if necessary, urge upon the Legislature, the necessity for embodying in the Statutes the recommendations in the following paragraphs in the Report of the Joint Committee on Legislation:—

"'The creation of a permanent circuit list for the trial of all actions in the High Court, and the necessary rearrangement of the sittings of the Divisional Courts.

"'That some means should be devised to settle definitely before a case is called for trial whether it is to be tried with or without a jury.'"

Mr. C. H. Ritchie, Q.C., moved, seconded by Mr. J. K. Kerr, Q.C., "That a Committee on Legislation be appointed by this Association for the ensuing year, whose duty it shall be to consider, from time to time, what changes in or amendments of the laws, rules of court, or practice may, in their opinion, be desirable, and to submit their views thereon in the proper quarters, and to use their efforts to have the same carried into effect, also to make such suggestions in regard to proposed legislation as they may deem advisable; and that such Committee be composed of the following persons: John Hoskin, Q.C., Charles Moss, Q.C., Walter Cassels, Q.C., John Bain, Q.C., T. D. Delamere, E. Douglass Armour, J. A. Worrell and D. E. Thompson." The motion was carried.

Mr. J. K. Kerr, Q.C., was elected President for the ensuing year.

Mr. B. B. Osler, Q.C., thereupon vacated the chair, and Mr. Kerr, Q.C., took the chair as President.

It was moved by Mr. Moss, Q.C., seconded by Mr. E. D. Armour, and carried unanimously, that a vote of thanks be presented to the retiring President, Mr. B. B. Osler, Q.C., for his services during the two years which he had been in office.

The other officers elected were Vice-President, James Maclennan, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Trustees, Messrs. J. H. Macdonald, Q.C., Z. A. Lash, Q.C., N. G. Bigelow, A. H. Marsh and G. H. Watson; Secretary, Mr. Thomas Urquhart.

It was moved by Mr. B. B. Osler, Q.C., seconded by Mr. Walter Barwick, and carried unanimously, That a vote of thanks be presented to Mr. Alexander Munro Grier, retiring Secretary, to whom it was due that the minutes should be entered upon the books of the Association, indicative of their appreciation of his services.

The meeting then adjourned.

DIARY FOR MARCH.

1. Thur ...St. David.
4. Sun.....*3rd Sunday in Lent.*
5. Mon....Holt, C.J., died, 1710, æt. 65.
6. Tues....Court of Appeal sits. Gen. Ses. and C. C. sittings for trials in York. York changed to Toronto, 1834.
11. Sun.....*4th Sunday in Lent.*
13. Tues....Lord Mansfield born, 1704.
17. Sat.....St. Patrick's day.
18. Sun.....*5th Sunday in Lent.* Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
19. Mon....P. M. Vankoughnet, 2nd Chancellor, 1862.
25. Sun.....*6th Sunday in Lent.*
28. Wed....Lord Romilly appointed M.R., 1851.
30. Fri.....Good Friday. B.N.A. Act assented to, 1867. Reformation in England began, 1534.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

TRAVERSY *v.* GLOUCESTER.

Bridge—Approach—Liability of local municipality not taken away by sec. 530 *of the Municipal Act.*

Section 530 of the Municipal Act, 46 Vict. cap. 18, provides that "The approaches for one hundred feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by such municipality or municipalities; the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate."

The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the joint jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within one hundred feet of the end of the bridge, but it was not shown that there was any artificial structure to enable the public to pass from the road to the bridge and from the bridge to the road, which would cover the point where the accident occurred.

Held, reversing the judgment of ROBERTSON, J., at the trial, nonsuiting the plaintiff.

1. That the word "approaches" in the section means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge, and from the bridge on to the road, and does not include the highway to the distance of one hundred feet from each end of the bridge, at all events, unless the artificial structures extend so far.

2. That in any case sec. 530 does not relieve the local municipality from its statutory liability to repair, but merely gives the local municipality the right to enforce its provisions against the municipality or municipalities owning the bridge.

REGINA *v.* TRIGANZIE.

Assault—Evidence of previous indictable offence—General reputation.

An indictment for an assault occasioning actual bodily harm contained a second count, charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after previous conviction for felony, additional punishment might be imposed. The first part of the indictment only was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner, in his defence, gave evidence of good character. The Crown gave some general evidence in rebuttal, and then tendered, under 32-33 Vict. c. 29, s. 26, a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction.

Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation, evidence of a prior conviction going to the matter of punishment, and not to general character.

Regina v. *Rowton*, 10 Cox, C. C. 25 followed.

ARCHBOLD *v.* THE BUILDING AND LOAN ASSOCIATION.

Mortgage—Six months' notice of intention to pay off after default—Contract as to time—Interest after maturity.

T. borrowed money from defendants, and gave a mortgage on certain lands as security, with other securities as collateral, giving a second mortgage on the said lands to plaintiff. Both mortgages being in default, defendants agreed in writing with plaintiff, who began foreclosure proceedings, that if he obtained a final order, subject to their claim, they would accept from him a new mortgage on the same property for $15,000, payable in five years from date of order, with interest at eight per cent., and that he was "to have the privilege of paying any part of the principal at any time." Upon payment, as aforesaid, defendants were to assign to plaintiff their mortgage from T., and all collaterals. Plaintiff obtained a final order, and gave defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years, with interest at eight per cent., half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for the assignment to the plaintiff of the original securities, and had a clause that the mortgagor may at any time pay off the whole or any part of the said $15,000 before the expiration of the said term of five years, and the said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of the principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years plaintiff paid interest at the said rate on said sum until the 1st of January, 1887, and on the 22nd of March following tendered defendants the principal and interest at the said rate up to that day, and demanded an assignment of the original mortgage and securities. Defendants refused to accept the same, claiming that they were entitled to six months' notice of the mortgagor's intention to pay, or to six months' interest in advance.

Held, ARMOUR, C.J., dissenting,

1. That the rule followed by courts of equity in England that a mortgagor must, after default by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, had the force of law in Ontario.

2. That there were no circumstances in the present case to do away with its effect, the provision for payment of the principal being limited to the five years within which plaintiff had covenanted to pay the same.

3. That after the expiration of five years from the date of the mortgage there was no contract in force for the payment of interest, defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months' notice.

4. That in this case the defendants were entitled to the six months' notice, and the tender on the 22nd of March, 1887, was insufficient, and as no evidence was given by defendants as to the rate of interest after default, and evidence offered by plaintiff on the point was refused at the trial, the legal rate of six per cent. would be taken as the measure of damages.

Practice.

Patterson, J. A.] [May 17, 1887.
Court of Appeal.] [Jan. 10, 1888.

PLATT *v.* GRAND TRUNK RAILWAY CO.

Appeal—Dismissal for delay—Extending time—Special circumstances—Judge in Chambers, powers and discretion of.

Motion to dismiss defendants' appeal to this court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th of April, 1886, and notice of appeal was given two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th of September following, and did not reach them till the 27th of September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties in an attempt to settle the appeal case, and at the end of that period it became apparent that

there must be a motion to a judge to settle the case. From the 1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th of May, 1887. The reason given for the delay after the 1st of March was that the appellants' solicitor thought it best to have the case settled by the judge who tried the action, and that the judge did not during the time in question hold Chambers, he being away on circuit. It was shown, however, on the other side, that he was not continuously absent during this period.

Held, by PATTERSON, J.A., in Chambers, that no special circumstances were shown to justify an extension of time, and that the appeal should be dismissed for want of prosecution.

Held, on appeal by the court, that the judge in Chambers had power to make the order dismissing the appeal, and that his discretion should not be interfered with.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

J. Maclennan, Q.C., and *T. Langton*, for the respondent.

Boyd, C.] [Jan. 9, 1888.

HARVEY *v.* MCNEIL.

Creditors' Relief Act—Mortgage action—Execution creditors againsts lands—Ratable distribution of proceeds of sale—Foreclosure judgment.

The Creditors' Relief Act applies to execution creditors against land in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale.

Semble, in the case of foreclosure, the old form of decree giving execution creditors, as subsequent encumbrancers, liberty to redeem according to their priorities is no longer applicable.

In this case the judgment for foreclosure was changed to sale, and the following order was pronounced on appeal from a Master's Report: Let the land be sold, and after paying what is due to the mortgagee, and interest and costs applicable to his claim, let the balance be divided ratably between the execution creditors, who are each to add their costs of this appeal to their claims, and any other execution creditors who may come in before the Master on his calling for such claims before report on sale.

C. J. Holman, for defendant, Warnock.
Middleton, for plaintiff.

Boyd, C.] [Jan. 10, 1888.

ARPIN *v.* GUINANE.

Venue—Preponderance of convenience—Disclosing the names and evidence of witnesses.

The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the Master in Chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important; and changed the venue to Toronto. Upon appeal,

Held, that the conclusion of the Master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but

Semble, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed.

Hoyles, for the plaintiff.
H. T. Kelly, for the defendant.

Street, J.] [Jan. 20, 1888.

In re SOLICITOR.

Solicitor and client—Reference to taxation at Solicitor's instance—Order for payment—Costs of reference.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the Court, and

there should be a clause in the order directing the payment by the client of the amount to be found due to the solicitor.

Semble, also, that the order for taxation under Rule 443 should, under the authority of sub-sec. "*d*" of that Rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

Millar v. *Cline*, 12 P.R. 155, distinguished.

In re Harcourt, 32 Sol. J. 92, followed.

H. H. Macrae, for the solicitor.

No one for the client.

Armour, C. J.] [Jan. 16, 1888.

LAING *v.* SLINGERLAND.

Arrest—Capias—Affidavit—"Intent to defeat."

The use in the affidavit upon which an order for the issue of a *ca. re.* was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. c. 67, s. 5.

Held, not fatal to the arrest.

Neven v. *Butchart*, 6 U. C. R. 196; *Hargreaves* v. *Hayes*, 5 E. B. 272; *McInnes* v. *Macklin*, 6 U. C. L. J. 14; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Bamberg* v. *Solomon*, 2 P. R. 54, referred to.

Aylesworth, for the plaintiff.

Watson, for the defendant.

Street J.] [Jan. 21, 1888.

In re ST. CATHARINES AND NIAGARA CENTRAL RAILWAY CO. AND BARBEAU.

Railway company—Incorporation by Provincial Act—Subsequent legislation by Parliament of Canada—Applicability of ss. 4 to 39 of the General Railway Act of Canada.

A railway company, incorporated by an Act of the Ontario Legislature, was thereby authorized to construct, equip, and operate a railway between certain points.

By an Act of the Dominion Parliament, the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament.

Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected; that the railway in question was not one "constructed or to be constructed under authority of any Act passed by the Parliament of Canada" (see sec. 3 of the Railway Act of Canada R. S. C., chap. 109); and, therefore, secs. 4 to 39 of R. S. C., chap. 109 did not apply to it; and a motion to a judge of the High Court of Justice, under sec. 8, for a warrant of possession of certain lands was refused.

Aylesworth, for the company.

Robinson, Q.C., for the landowner.

Street, J.] [Jan. 21, 1888.

MCINTOSH *v.* ROGERS.

Vendor and purchaser—Verification of abstract—Mortgage thirty-six years old, presumption or proof of payment—Registration of instrument, evidence of—Possessing title, evidence of—Election to make perfect title, notwithstanding terms of contract.

Upon a reference as to title in an action to enforce specific performance of a contract for the sale of land, a solicitor's abstract was delivered by the vendor, and certain objections made by the purchaser to the verification of it. The purchaser appealed from the Master's rulings upon these objections:

(1) A mortgage made by W. in 1850 to the M. B. Society was set forth in the abstract, and it was alleged that it had been paid, and, besides that, it was barred by the Statute of Limitations, W., and those claiming under him, having been in possession for thirty-six years. The mortgage was produced, and had indorsed upon it a memorandum without date and purporting to be signed by the Secretary-Treasurer

of the M. B. Society, that it was paid and settled in full, but the signature was not proved. The mortgage recited that W. had become the purchaser of two shares in the M. B. Society, and had agreed to pay £100 therefor; the proviso was for payment at the times appointed by the rules of the Society—by monthly subscriptions, to continue until the objects of the Society should be attained. Affidavits were produced from the vendor and the persons who had owned the land during the ten years next before the contract, that they had paid nothing and had never been asked to pay anything upon this mortgage. In a conveyance dated 3rd of May, 1856, this mortgage was treated as a subsisting incumbrance, and in a conveyance dated 10th of October, 1874, the grantor covenanted that he would procure a discharge of this mortgage. No evidence was given as to when the mortgage money became payable under the rules of the Society, nor whether the objects of the Society had been attained, nor any explanation as to why the mortgage had not been discharged, nor as to any difficulty in showing payment.

Held, that this mortgage should not, in favour of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chancery General Orders 394 and 396, should the question be disposed of upon a presumption of law. The vendor should show that some portion of the purchase money did not become payable under the rules of the Society within the period of ten years before the contract, or that this could not be ascertained; that the records of the Society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage that it had been paid in full.

(2) The purchaser required evidence of the registration of a deed from L. G., and other named persons, to S. G., which deed was set out in the abstract and stated to be registered. The vendor produced a deed answering the description in the abstract, but having no certificate of registration indorsed upon it, and a registrar's abstract containing a statement of the registration of a conveyance bearing the same date and covering the same land as the abstracted deed, but setting forth the parties to it only as "L. G. *et al.* to S. G."

Held, that the purchaser was entitled to some further pooof of the identity of the registered conveyance with the one produced; either the production of a certified copy of the registered conveyance, or the certificate of the registrar indorsed upon the instrument produced that the original was registered in his office. The purchaser was not bound to take the statement produced and examine it with the registered instrument, or procure a copy at his own expense.

Re Charles, 4 Chy. Chamb. R. 19, not followed.

(3) The vendor set out a perfect paper title in his abstract, and wound up with an assertion that he had also a good title by virtue of the statute of limitations.

Held, that if the vendor relied upon the possessory and not the paper title, the purchaser would be entitled to stricter and more satisfactory and complete evidence, and should have the persons who made the affidavits produced for cross-examination, for the reasons given in *re Boustead* and *Warwick*, 12 O. R. App. 491.

(4) It appeared that the vendor had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it.

Held, that this being so, the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract.

[As to the operation and effect of the contract, see this case reported, 14 O. R. 97.]

Hoyles, for the plaintiff.

G. W. Marsh, for the defendant.

Mr. Dalton.] [Feb. 1, 1888.

BROWN *v.* PEARS.

Discovery—Action for specific performance—Examination of grantors of vendor before defence—Objections to title—Condition in contract—Time.

In an action by a vendor for specific performance of a contract for sale of land at the price of $24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was $5,000. The sisters were old and infirm, and being unmarried, lived, and had

for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant.

Held, that under these circumstances, the defendant should be allowed under rule 285, to examine the two sisters before delivering his defence.

It was contended on behalf of the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and this was not taken until a week later.

Held, following *Want* v. *Stalliteras*, L. R. 8 Ex. 175, that such a condition should not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title.

Watson, for the plaintiff.

Alan Cassels, for the defendant.

Street, J.] [Feb. 4, 1888.

EMERSON *v.* GEARIN.

Counter-claim—Costs—Construction of order.

Although for some purposes a claim and counter-claim form but one action, yet the costs of the counter-claim are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation to be treated as a cross action.

McGowan v. *Middleton*, 11 Q. B. D. 464, and *Beddall* v. *Maitland*, 17 Chy. D. 174, followed.

And where the order of a Divisional Court varied the judgment at the trial by directing that the counter-claim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into court the amount of the costs *of the action*, but was silent as to the costs of the counter-claim.

Held, that the rights of the parties must be governed by this order and not by anything that preceded it, and that under it the plaintiffs were not entitled to take the costs of the counter-claim.

McClive, for the plaintiffs.

H. H. Collier, for the defendants.

Q. B. Divisional Court.] [Feb. 6, 1888.

In re GRAHAM *v.* TOMLINSON.

Prohibition—Division Court—Notice disputing jurisdiction—Ascertainment of amount.

The operation of s. 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the Division Courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction when the amount claimed is beyond the competence of a Division Court.

In re Knight v. *Medora*, 14 A. R. 112, and *In re Mead* v. *Creary*, 32 C. P. 1, followed.

But where a cheque for $122 was given to the defendant by the plaintiff as a loan of the money represented by it;

Held, on motion for prohibition, that the indorsement of the signature of the defendant on the cheque was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy s. 54 of R. S. O. c. 47, as amended by s. 2 of 43 Vict. c. 8, and to give a Division Court jurisdiction.

Kinsey v. *Roche*, 8 P. R. 515, overruled; and *Wiltsie* v. *Ward*, 8 A. R. 549, and *Forfar* v *Clunie*, 10 P. R. 90, considered.

C. C. Robinson, for the plaintiff.

Morson, for the defendant.

Robertson, J.] [Feb. 6, 1888.

HARTNETT *v.* CANADA MUTUAL AID ASSOCIATION.

Discovery—Examination of local agent of Life Insurance Company.

In an action upon a life insurance policy, an order was made at the instance of the plaintiff for the examination for discovery only of the local agent of the insurance company who procured the application for insurance.

O'Sullivan, for the plaintiff.

Masten, for the defendants.

Q. B. Divisional Court.] [Feb. 6, 1888.

In re CURRY.

Arbitration — Extending time for making award—Death of party—No provision for appeal—Statute of Limitations.

Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not act as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties had died since the submission, and the survivor now applied to the court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim.

Held, reversing the decision of ROSE, J., that the facts of the death and the absence of the right of appeal would not warrant the court in refusing to enlarge the time, and that, under the circumstances, no injustice would be done by enlarging it.

Edwards v. *Davies*, 23 L. J. Q. B. N. S. 278; *Brown* v. *Williams*, 6 D. & L. 235; *Lord* v. *Lee*, L. R. 3 Q. B. 404; *Denton* v. *Strong*, L. R. 9 Q. B. 117, referred to.

Aylesworth, for the applicant.

H. J. Scott, Q.C., contra.

Mr. Dalton, Q.C.] [Feb. 6. 1888.

FOLEY *v.* LEE.

Action — Dismissal for non-prosecution — Motion by two defendants where there are others.

A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with the writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial.

Held, that it was the duty of the applicants to have applied to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants before making such a motion.

J. M. Quinn, for the motion.

G. W. Holmes, contra.

Armour, C. J.] [Feb. 7, 1888.

ODELL *v.* CITY OF OTTAWA.

Discovery—Examination of servant of corporation.

In an action for damages, for negligence against a corporation in which the complaint was that a traction engine of the defendant's had caused an accident which resulted in injury to the plaintiff, an order was made at the instance of the plaintiff for the examination for discovery of the driver of the engine.

Aylesworth, for the plaintiff.

Watson, for the defendants.

MacMahon, J.] [Feb. 9, 1888.

REGINA *ex rel.* CHAUNCEY *v.* BILLINGS.

Municipal elections—Quo warranto—Defective material—Statement—Recognizance—Affidavit—Amendment.

Upon an application for a *fiat* for the issue of a summons in the nature of a *quo warranto* under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not show that he was a candidate or an elector who voted, or who tendered his vote, at the election, as required by sec. 185 of the Act; and the recognizance filed by the relator was not entered into before a judge or commissioner for taking affidavits, nor allowed by the judge in the manner prescribed by sec. 186, nor was it conditioned to prosecute the writ with effect, and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by rule 2 of the rules of Michaelmas Term, 14 Vict.

Held, that these were defects in the material necessary to ground the application, not mere irregularities which could be amended at a later stage; and the *fiat*, the writ, and all proceedings were set aside with costs.

Q. B. Divisional Court.] [Feb. 6, 1888.

ADAMS *v.* WATSON MANUFACTURING CO.

Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 *Vict. c.* 26*—Rights of assignee—Fraudulent preference—Amendment—Rule* 103.

The firm of R. & Co., consisting of three members, supplied goods to the defendants up to the 2nd of December, 1885. After that date one of the members retired, and assigned his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and subsequently made an assignment to E. under 48 Vict. c. 26, for the benefit of their creditors. E. sold to the plaintiff the account supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and the plaintiff brought this action for the amount of such account.

The defendants, however, set up that the goods in question were not purchased by them, but were consigned to them for sale by R. & Co., and that the proceeds of the goods actually sold were by instruction of R. & Co. remitted to H. & Co., to whom R. & Co. had assigned the proceeds of such sale, and submitted that H. & Co. should be made parties.

At the trial, it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The trial judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties.

The plaintiff moved, by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue remaining unsold of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co. if the transfer to them should be upheld, or absolute if that transfer should be set aside as a fraudulent preference.

Held, that these questions were "questions involved in the action" within the meaning of Rule 103, having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that rule; but that the amendment must be confined to the plaintiff's possible rights.

By s. 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co.; but that transfer was not made by the same firm of R. & Co. which assigned to E.; the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those against whom only a fraudulent preference by the original firm could be declared void. The plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and as against the original defendants to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent. Falconbridge, J., *dubitante* as to the disposition of costs.

G. T. Blackstock, for the plaintiff.

John Crerar, for the defendants.

Street, J.] Feb. 9, 1888.

In re HOOPER AND ERIE & HURON RAILWAY CO.

Railway company—Notice of expropriation—Desistment.

A railway company at different times served H. with three several notices, under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could

not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them, when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention, and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.

Grierson v. *Cheshire Lines Committee*, L. R. 19 Eq. 83, referred to.

Wm. Macdonald, for the landowner.

Lash, Q.C., for the railway company.

MacMahon, J.] [Feb. 10, 1888.

HEDDLESTONE *v.* HEDDLESTONE.

Devise of land—Restraint on alienation—Invalidity of devise.

Testator devised as follows: "I also will that that portion of the within mentioned lands, which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them, either by sale, by mortgage, or otherwise except by will to their lawful heirs."

Held, invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restriction above mentioned.

A. H. Marsh, for plaintiff.

J. Hoskin, Q.C., for infants.

Street, J.] Feb. 10, 1888.

REGINA *v.* GREEN.

Criminal law—Conviction for selling intoxicating liquor to an Indian—Variance as to date between evidence and conviction—R. S. C. c. 43, s. 87—Findings of magistrate, when reviewable.

A summary conviction by the police magistrate of the county of Brant for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. c. 43, stated that the offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887.

Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake, and that s. 87 of R. S. C. c. 43, operated to cure this irregularity, as also certain other irregularities complained of, the offence having been clearly proved, the police magistrate having express jurisdiction by s. 96 of the Act, and the punishment imposed being within the power conferred upon him.

Held, also that where the proceedings before a magistrate are removed under 29 and 30 Vict. c. 45, s. 5, the judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal.

Mackenzie, Q.C., for the defendant.

Aylesworth, for the magistrate.

COUNTY COURT.

Peterborough.] [Feb. 14, 1888.

O'SULLIVAN *v.* BELLEGHEM.

Time—Computation—"Till."

The defendant obtained an order giving him till the 20th instant to file his statement of defence. The plaintiff on that day entered a note, under Rule 596, closing the pleadings against the defendant as in default of defence

L. M. Hayes moved to set aside the note citing *Dakins* v. *Wagner*, 3 Dowl. 535; *Kerr* v. *Jeston*, 1 Dowl. 538, N.S.; *Isaacs* v. *Royal Ins. Co.*, 5 Ex. 296; *McDonald* v. *McEwen*, 6 P. R. 18.

J. O'Meara contra.

WELLER, CO. J.—I am of the opinion that, in an order of the kind made by me, the word "till" (without some word, for example, "exclusive,") means inclusive of the day to which it is prefixed. Therefore the plaintiff was wrong in causing the pleadings to be noted closed on that day. The plaintiff, having taken the chance of being strictly correct, should pay the defendant's costs of the motion.

The Canada Law Journal.

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THE consideration of the new tariff reminds us that the profession have, as a class, an unnecessary burden of odium to bear in the minds of the uninitiated in their position of tax collectors to pay fees to certain court officials. If we were asked to offer a suggestion for a remedy, we should propose that the Ontario Legislature should meet only once every two years, and that the money which this annual gathering costs the public should go towards paying that which is now collected from litigants by way of stamps. Nobody wants the annual dose of legislation which our provincial legislators feel bound to give as an equivalent for their pay. The country would vastly prefer the large sum of public money thus annually wasted.

THE LAND TITLES ACT.

IN our review column we call attention to some of the alterations made in this Act under the auspices of the Statute Revision Commissioners, and, as we presume, largely upon the recommendation of the Master of Titles.

The Land Titles Office, at Toronto, was established with a view of testing how far owners of land in the city of Toronto and county of York would take advantage of the system. The result of this test, so far, seems to be favourable.

Last year this office nearly paid its way, the receipts being $4,300, and the expenses about $5,000. This may have the effect of encouraging outer counties to bring the Act into force in their localities. Under the law, as it now stands, this is a matter entirely within the power of the locality interested, as the municipal council of a county, city, or town, may pass a by-law declaring it expedient that its provisions should be extended to the locality. Upon this being done, and proper accommodation provided, the Governor in Council has authority under the Act to extend its operation by proclamation. This statute has been in force for a year, but we believe no locality has yet provided the necessary accommodation.

The Legislature last year, by 50 Vict. c. 15, extended the Act into the outlying districts, but this statute did not go into operation until the 1st of January last. Doubtless this extension was a wise step, as, if the system is a good one, it is important that it should be introduced at the earliest possible period into the unorganized territories, where a large number of patents are yet to be issued. The delay till the 1st of January was to permit of the system going into force under the provisions of the revised statute.

Local masters have been appointed at the following places:—

At Bracebridge, for the district of Muskoka; at Parry Sound, for the district of Parry Sound; at Sault Ste. Marie, for Algoma; at Port Arthur, for Thunder Bay; at North Bay, for Nipissing.

All patents in these districts are now transmitted by the Crown Lands Department to the local masters, and certificates under the Act issued by them to the patentees.

In Toronto the parties who have chiefly taken advantage of the Act are the owners of lands in the neighbourhood of the city, who are cutting them up into lots for the purpose of sale, and the value of mere farming land, or other land which has been fully improved by building, brought under the Act is comparatively small. The present value of land under the Act is between five and six million dollars. The transactions with reference to this land have been numerous, the number of registrations being over 2,000.

Possibly the amount required to be contributed to the Assurance Fund, one-quarter per cent. on the value, may stand in the way of the early extension of the Act to improved property, as this charge is a pretty heavy tax where expensive buildings have been erected, and the owners do not contemplate selling. It might be advisable for the Government to consider whether it would not be expedient to permit this to remain as a lien upon the property until the owner desires to deal with it. On the other hand it may be urged that it is absolutely necessary that the assurance fund should attain at an early period a considerable sum so that there may be funds on hand to make good any losses which may occur; undoubtedly losses will occur sooner or later even under the most careful supervision.

PROPOSAL FOR A LAW SCHOOL.

ONE of the most important matters which have come before the profession for many years is that connected with the scheme recently propounded for the establishment and maintenance of a law school. We have before us the proposal of the Joint Committee appointed by the Law Society and the Senate of the University of Toronto, for the advancement of legal education and the establishment and maintenance of a law faculty. It reads as follows:—

1. There shall be a Faculty of Law, under the joint management of the Law Society of Upper Canada and the University of Toronto.

2. In order to entitle a candidate to enter this faculty, he shall pass such a preliminary examination as may be prescribed by the Joint Committee hereinafter mentioned, subject to the approval of the Law Society and the Senate of the University.

3. The course of study shall extend over four years.

4. The University shall, at its own expense, make provision for the delivery of lectures and the holding of examinations, including preliminary examination, during the first and second years, and the Law Society shall make the like provision for the third and fourth years of the course.

5. The Joint Committee hereinafter mentioned shall indicate what subjects of instruction in jurisprudence (having regard to civil law, constitutional law and history, and international law), shall be undertaken by this University. The subjects upon which the Law Society will give instruction shall be such as it shall from time to time determine.

6. Students will be required to attend the course of lectures during each of the four years, and to pass the annual examination to be held at the end of each year.

7. Students of the first and second year must not be under articles or engaged otherwise than as students of the University.

8. Every student attending the lectures and the preliminary examination, and the first and second years, shall pay to the University such fees as it may prescribe in that behalf.

9. Every student attending the lectures and examinations of the third and fourth years shall pay to the Law Society such fees as it may prescribe in that behalf.

10. Every student who passes the four annual examinations shall be entitled to receive from the University the degree of LL.B. upon payment to the University of such fee for said degree as the University may prescribe in that behalf.

11. Every student who obtains such degree shall be entitled to be admitted by the Law Society to the degree of barrister-at-law, upon payment to the Law Society of such fee therefor as the Law Society may prescribe in that behalf.

12. Every student who has obtained said degree of LL.B., upon proof of service as an articled clerk for two years, shall be entitled to be admitted as a solicitor upon payment of such fees as are prescribed by the Law Society.

13. Subject to ratification by the Joint Committee hereinafter mentioned, appointments of examiners for the first and second years shall be made by the University, and those for the remaining years by the Law Society.

14. The results of all examinations shall be reported to the University Senate and to the benchers of the Law Society, who shall each have like powers in respect thereof as they now enjoy in respect of other reports of examinations.

15. The Joint Committee shall be composed of nine members, four to be chosen by the University, and five by the Law Society, annually in the month of May each year. Members of the said Committee shall continue in office until their successors are appointed. Any vacancy in said Committee shall be filled up by the body whose appointee may have ceased to be a member of the Committee, in such manner as such body shall determine; said Committee shall appoint one of their number chairman of said Committee.

16. The Joint Committee shall be charged with the carrying out of all matters of administration in connection with this scheme.

17. Nothing herein contained is intended to interfere with the existing regulations providing for admission by the Law Society to the degree of barrister-at-law, or for the granting of certificates of fitness.

18. The Law Society may, upon similar terms, enter into this scheme with any university in Ontario.

This is a subject which will require careful consideration. Nothing should be done hastily. There is much to be said in favour of the scheme, but there are several forcible objections to it in its present shape. These objections are fully stated by Mr. Worrell, in a letter which appears elsewhere in our columns.

A law school has been the dream of the profession for many years, but up to the present time no great success has attended the various efforts that have been made in that direction. One great difficulty is the fact that a good law school

requires the services (one might say, almost, the undivided services) of a staff of thoroughly competent men, with trained legal minds, who could devote their time almost entirely to the education of those committed to their charge. Such men, for example, as Frederick Pollock, and others well known in England. If the Law Society cannot afford to pay the sums required to secure the services of men of that stamp, and if the much larger resources of the University of Toronto can be utilized for the establishment of a law school which would be a credit to the English speaking Provinces of this Dominion, it certainly would be desirable for us to sit down quietly and discuss the situation and examine the proposed scheme, and, if no better one is suggested, make it as perfect as possible and adopt it.

Whether the scheme now formulated is the best that can be adopted, we are not at present prepared to say. Whatever is done, there should be for everyone desiring to enter our profession, in the first place, the foundation of a liberal education and the thorough training of the mind of the student, then a careful study of the theory of law in its wider aspect, and then a sufficient time given to learn the details of statute law, and the practice of the courts, and to acquire a knowledge of general business. As a rule, the three year university men are, at the end of their course, better fitted for the duties devolving upon them than those who take the longer course of five years without having the advantage of previous university training. It may, therefore, fairly be argued that the four years proposed by the new scheme, two years being devoted to theory, and two to practice, would give better results than the five years where students so frequently learn nothing except what they inhale from being surrounded for that length of time by a legal atmosphere. On the other hand, there are many who think that two years only devoted to practical study in an office is insufficient; and it certainly would be a serious evil to do anything which would lessen the number of those who are willing to take a course in arts before they study law.

In reference to the present suggestion, we gather that there is in the minds of some who discuss it a tinge of jealousy of Toronto University, which, perhaps, is not altogether unnatural; those interested in some of the smaller universities may not like the idea of any scheme which appears to them to give an undue preference to the University of Toronto. But, in answer to this, it may be said that if the latter can give the greatest advantages to the legal profession, these advantages should not be lost because other universities are not in a position to do as much. All these bodies are, however, we believe, to be consulted, and we presume nothing will be done without paying careful attention to any suggestions which they may think proper to offer.

We shall, doubtless, hear from others on the subject, and hope to refer to the matter again at an early date.

THE NEW TARIFF OF FEES AND DISBURSEMENTS.

IT has been found necessary to provide that the Consolidated Rules shall not come into operation until the 1st of April. The day selected for their coming into force is a suggestive one; we are in hopes, however, that no one contemplates perpetrating any foolish joke at the expense of the profession. The tariff of fees and disbursements, which is to be embodied in the Consolidated Rules, has been printed and distributed, and we have made a comparison of it with the tariff which it is intended to supersede.

The tariff is divided into two columns, in one of which are placed the fees according to the higher scale in the High Court and Court of Appeal, and in the other column the fees to be allowed according to the lower scale and in the County Courts.

With regard to the fees payable to solicitors and counsel, we observe a few necessary and welcome items have been added, which are not to be found in the former tariff. For instance:

"Instructions for petition when no writ of summons issued, $2.00, $1.00."

"Suing out any writ of execution, $6.00, $4.00."

"Renewal of any writ of execution, $4.00, $2.50."

"In both cases including placing same in sheriff's hands, all attendances and letters in connection therewith."

But, we presume, this fee does not include the disbursements paid for the writ, or to the sheriff. The following items have also been added:

"Instructions for special affidavit of disbursements, $2.00, $1.00."

"Demand of particulars, 50 cents, 50 cents."

"Particulars of claim, demand, set-off, or counter claim, five folios or under, $2.00, 75 cents."

"If exceeding five folios, per folio in addition, 20 cents, 15 cents."

"Perusal of affidavits and exhibits of a party adverse in interest, filed or produced on any application, when perusal is necessary, if twenty folios or under, $1.00, 50 cents."

"Drawing brief, for each folio above five, 10 cents, 10 cents."

"Appearance for each additional defendant, 20 cents, 10 cents."

We are also glad to see a little increase of liberality in the matter of counsel fees, *e.g.*, an item is added, "counsel fee on consultations, $5.00, $2.00"; and power is given to taxing officers generally, to allow increased counsel fees at trial to an amount not exceeding $40 to senior, and $20 to junior counsel.

A fee to counsel for settling appeal case, and reasons for, and against, appeal, of $5.00, $2.00, with power to increase to $20.00, $5.00.

The new tariff also expressly provides that counsel fees at arbitrations may be taxed on the same scale as at trials.

On the whole, we think the new tariff of fees will be welcomed by the profession as a move in the right direction, though it can hardly be said to have made any very perceptible increase in the remuneration of solicitors, and cer-

tainly not to the extent which the progressive cost of living would render just. Some additional relief to our over-burdened tax-collecting profession might have been granted by the reduction of disbursements ; but so long as a considerable class of officials are paid by fees it is perhaps too much to expect that the tariff of disbursements will be lowered.

Ever since the Judicature Act came into force it has been a matter of difficulty to know what were the proper court fees payable on any proceeding. The promulgation of the new tariff will, at all events, relieve both the profession and the officials of the court from this source of embarrassment. There is one feature which strikes us about this part of the tariff, and that is its needless prolixity. If we remember rightly, a tariff of disbursements was framed for the judges in the year 1885, with the assistance of the taxing officers, which, in fifty items, included all that is included in the present tariff, which is spread out over about 140 items. We do not think the expansion is any benefit, but rather the reverse.

In some few items it will be found that the disbursements are reduced, but the items on which reductions have been made are, for the most part, of rare occurrence, and therefore the reduction will be little felt. Some little difference of opinion will probably arise as to the effect of the item for entering an action for trial or assessment which is fixed at $2,00, 50 cents. The heading of the tariff states that it is inclusive of all fees expressly imposed by statute. R.S.O. (1887), c. 52, s. 148, expressly imposes a fee of $3.00 in the High Court, and $1.50 in the County Court, for cases entered for trial by jury. Is the new tariff intended to supersede this statutory fee? and if so, have the judges power to abrogate the express provisions of an Act of Parliament? Who can tell?

As an instance of the unnecessary prolixity to which we have referred, we observe the fees for entering judgment are spread over five items, *e.g.*:

"Every interlocutory judgment, or judgment by default, 50 cents, 30 cents;" "additional fee by statute, 60 cents."

"Every final judgment otherwise than judgment by default, 50 cents, 50 cents;" "additional fee by statute, 60 cents."

"Entering and docketing judgment, 50 cents."

This multiplication of items seems to us useless and somewhat confusing.

The fee for a commission to take evidence is reduced from $1.50 to $1.00, and the fee on a commission for taking affidavits or bail is reduced from $2.50 to $2.00.

On the other hand, the fees for attendance in the office of the Master in Ordinary are increased from $1.00 to $1.50 per hour, which will, of course, make a very considerable increase in the expense of references in his office. This increase, perhaps, may be justified on the ground that it is anomalous to have one scale of fees for the Local Masters, and another for the Master in Ordinary. The result of the increase being merely to make the fees in all the Masters' offices the same.

Some little difficulty may be experienced by some of the *ex-officio* Official Referees in knowing what to charge for attendances before them. The Regis-

trars, for instance, are entitled as Registrars to charge for "every reference, inquiry, examination, or other special matter, for every meeting not exceeding one hour, $1.00, 75 cents, and for every additional hour or less, $1.00, 50 cents; but in their capacity as Official Referees every attendance upon any proceeding, etc., is $1.50, 50 cents, per hour."

The fees for proceedings under the Quieting Titles Act seem to be largely increased. Formerly, in an uncontested case, the only fees payable to the Referee were fifty cents on each deed in the claim of title, but under the new tariff filings and attendances, reading affidavits, etc., etc., are all the subjects of a fee.

No fees are prescribed for admission of solicitors, or call to the bar. Is it intended in future that solicitors and barristers shall be admitted and called gratis?

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for February include 20 Q. B. D. pp. 145-296; 13 P. D. pp. 13-23; and 37 Chy. D. pp. 55-167.

PRACTICE—WRIT—SERVICE OUT OF JURISDICTION—CONTRACT AFFECTING LAND—LANDLORD AND TENANT—ONT. R. 45 c.

Taking up first the cases in the Queen's Bench Division, *Kay* v. *Sutherland*, 20 Q. B. D. 147 is deserving of notice. This was an action by an outgoing tenant of a farm in Yorkshire to recover from his landlord, who was ordinarily resident in Scotland, compensation for "tenant right according to the custom of the country;" and the question was whether this was a "contract obligation or liability affecting land" within the meaning of Ord. xi. r. 1 (Ont. R. 45 *c*), or a mere personal obligation. A Divisional Court (Stephen and Charles, JJ.) held that it was a contract affecting land within Ord. xi. r. 1, and that the case was distinguishable from *Agnew* v. *Usher*, 14 Q. B. D. 78, in which it was held that an action to recover rent due on a lease of land in England was not within the Rule.

PRACTICE—WRIT—SERVICE OUT OF JURISDICTION—WORK DONE OUT OF JURISDICTION—PLACE OF PAYMENT—ORD. XI. R. 1. (E), (ONT. R. 45 C).

Robey v. *Snaefell Mining Co.*, 20 Q. B. D. 152, is another case on the same point of practice. In this case the action was brought by a firm doing business in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the island. There was no agreement as to the place of payment. It was held by a Divisional Court (Stephen and Charles, JJ.) that it must be taken to be part of the contract that the plaintiff should receive payment in England, and that the action was therefore founded on a breach within the jurisdiction within the meaning of Ord. xi, r 1 (*e*). (Ont. Rule 45 *c*.)

PRACTICE—ADDING PARTIES—NON-JOINDER OF ONE OF SEVERAL JOINT-CONTRACTORS—ORD. XXI, R. 20; ORD. XVI, R. 11—(ONT. RULES 103, 142).

In *Pilley* v. *Robinson*, 20 Q. B. D. 155, a Divisional Court (Stephen and Charles, JJ.) held, on the authority of *Kendall* v. *Hamilton*, 4 App. Cas. 504, that when a plaintiff brings an action against one of several joint-contractors the defendant is entitled, as of right under Ord. xvi, r. 11 (Ont. R. 103), to have his co-contractors added as defendants, and is not obliged to resort to the third party procedure. The court in effect held, that though by Ord. 21, r. 20 (Ont. R. 142), pleas in abatement are abolished, yet that whenever a defendant could formerly have pleaded in abatement for non-joinder of parties, he may now apply under Ord. xvi, r. 11 (Ont. R. 103), to add such parties as defendants.

SOLICITOR AND CLIENT—RETAINER TO COLLECT DEBT.

James v. *Bicknell*, 20 Q. B. D. 164, is an appeal from the Lord Mayor's Court on a question involving the extent of a solicitor's authority to act for his client. In this case the solicitor had been retained to collect a debt. He proceeded and recovered judgment and issued execution, and upon the levy made under the execution, the goods were claimed by a third party, and the sheriff interpleaded: no special retainer, or instructions, were given by the client to engage in the interpleader proceedings, and the question was, whether the client was liable to the solicitor for costs of these proceedings paid by the solicitor to the sheriff and the claimant; the court (Wills and Grantham, JJ.) were unanimously of opinion that the client was not liable. A solicitor cannot, therefore, safely engage in any such collateral proceedings without the express and positive instructions of his client.

ARBITRATION, AGREEMENT FOR—SUING BEFORE ARBITRATION—CONDITION PRECEDENT—FIRE INSURANCE.

Viney v. *Bignold*, 20 Q. B. D. 172, was an action brought on a policy of fire insurance, in which the defendants pleaded that the policy was made subject to a condition, that if any difference should arise in the adjustment of a loss, the amount to be paid should be settled by arbitration, and the insured should not be entitled to commence any action on the policy until the amount of the loss had been referred and determined as therein provided, and then only for the amount so determined; that as differences had arisen, and the amount had not been referred or determined, it was contended by the plaintiffs that this furnished no defence in law, but the court (Wills and Grantham, JJ.), without calling on the defendant, upheld the defence.

RECEIVER—FUND IN DISCRETION OF TRUSTEES—ORDER AGAINST TRUSTEES FOR PAYMENT—PROHIBITION.

The main point involved in *The Queen* v. *Judge of C. C. of Lincolnshire*, 20 Q. B. D. 167, was very similar to that raised in *Fisken* v. *Brooke*, 4 App. R. 8. The defendant, a judge of a County Court, had made an order in an action pending in his court for the appointment of a receiver, to receive from trustees under a will,

a sum of money in their hands, and ordering the trustees to pay the interest to the receiver until the judgment in the action should be satisfied. By the will the trustees were directed to set apart and invest a fund, and at their absolute discretion to pay or apply the whole, or any part, of the income of the fund to, or for, the benefit of the judgment debtor in such manner, in all respects, as they should think proper. Under these circumstances the trustees applied to the High Court for a prohibition, and it was held by Pollock, B., and Hawkins, J., that as it depended altogether on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that as they are strangers to the action, an order for payment could not be made against them; and the prohibition was therefore granted.

ARBITRATION—AGREEMENT TO REFER FUTURE DISPUTES—STAYING PROCEEDINGS—SUBMISSION, REVOCATION OF—C. L. P. ACT, 1854, s. 11 (R. S. O. 1887, c. 53, s. 38).

In *Deutsche Springstaff* v. *Briscoe*, 20 Q. B. D. 177, an appeal was taken from an order of Pollock, B., refusing to stay proceedings in an action. The application for the stay was based on the fact that, by an agreement between the plaintiff and defendant, it had been provided that if any dispute should arise touching that agreement, the dispute should be referred to the arbitration of two named arbitrators or their umpire, the provisions of the C. L. P. Act, 1854, to apply to the reference. A dispute having arisen under the agreement, the defendants gave notice to proceed to arbitration. The plaintiffs then brought an action to recover the moneys in dispute, and revoked their submission to the arbitrators. Under these circumstances the Divisional Court (Stephen and Charles, JJ.) held that the order of Pollock, B., was right, and that the defendant had no right to have the proceedings stayed under the C. L. P. Act 1854, s. 11 (R. S. O. 1887, c. 53, s. 38), because the submission having been revoked, there was no subsisting agreement to refer capable of being enforced. The *ratio decidendi* turns principally on the fact that the agreement to refer was not an agreement to refer generally, in which case it would have been irrevocable; but an agreement to refer to certain named arbitrators, whose authority was revocable.

CRIMINAL LAW—LARCENY BY A TRICK—MONEY DEPOSITED TO ABIDE EVENT OF A WAGER—FRAUD.

The Queen v. *Buckmaster*, 20 Q. B. D. 182, is a Crown case reserved, in which the law as to larceny is discussed. The prisoner was at a race-meeting offering to lay odds against different horses. He made a bet with the prosecutor, and the money which the prosecutor bet was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he had received back not the identical coins actually deposited, but others of equal value. The prosecutor won the bet, but the prisoner went away with the money, and when afterwards met by the prosecutor he denied that he had made the bet. The prisoner was convicted of larceny, and the court (Lord Coleridge, C.J., Pollock, B., and Manisty, Hawkins, and A. L. Smith, JJ.) upheld the conviction. Lord

Coleridge, C.J., says: "Here the prosecutor deposited the money with the prisoner, not intending to part with the property, for he was to have his money back in a certain event; whereas the prisoner, when he received the money, never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he deposited, but other coins of equal value; but that does not show that he meant to part with his right to the money. In my opinion, the evidence shows that he meant to do nothing of the kind."

RECEIVER—MORTGAGEE IN RECEIPT OF RENTS—LEASE SUBSEQUENT TO MORTGAGE—ATTORNMENT OF TENANT OF MORTGAGOR TO MORTGAGEE.

Underhay v. *Read*, 20 Q. B. D. 209, was a contest between a receiver appointed at the instance of a judgment creditor of a mortgagor, and the mortgagee, as to the right of the latter to receive from the tenant of the mortgagor, under a lease made subsequent to the mortgage, the rents of the mortgaged property as against the receiver. By the order appointing the receiver the rights of the mortgagee were reserved, and default having been made in payment of the mortgage, the mortgagee had notified the tenant of the mortgagor under a lease made subsequent to the mortgage, that he required the tenant to pay his rent to him the mortgagee, and threatened him with legal proceedings if he did not, and the tenant accordingly paid his rent to the mortgagee. The receiver claimed that the payment was a breach of the receivership order, and that the tenant, notwithstanding the payment to the mortgagee, was liable to pay the rent again to him the receiver. The Court of Appeal (Fry and Bowen, LL.J.), held affirming the Queen's Bench Divisional Court, that the tenant had not been guilty of any disobedience in paying his rent to the prior mortgagee, whose rights were reserved by the receivership order; and that the tenant having paid his rent under compulsion of law, and in consequence of his lessor's default, could set up such payment in answer to the claim of the rent by the receiver who claimed through the lessor. In arriving at this result, it is not very surprising to find that the Court of Appeal did not think it necessary to call on the counsel for the tenant.

EASEMENT—RIGHT OF WAY—IMPLIED RESERVATION—GENERAL WORDS—"APPURTENANCES."

In *Thomas* v. *Owen*, 20 Q. B. D. 225, the plaintiff and defendant were prior to 1873 tenants from year to year of adjoining farms: the plaintiff had for many years used a lane on the defendant's land, and had, from time to time, repaired it. In 1873 the landlord granted the defendant a lease of his farm, which contained no reference to the lane, but the metes and bounds of the demised property included the lane. In 1878 the landlord granted the plaintiff a lease of his farm, and all "appurtenances thereto belonging," in which no specific mention was made of the lane. The defendant having subsequently obstructed the plaintiff's use of the lane, the action was brought. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.), affirming Mathew and Cave, JJ., held that

the lease of the defendant did not amount to a demise of the soil of the lane, free from the plaintiff's right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to the plaintiff, under which his then existing tenancy was constituted; that there was an implied reservation of the right of way out of the defendant's lease; and that the right of way passed to the plaintiff by the lease of 1878, under the word "appurtenances."

RAILWAY SHARES—SHARE CERTIFICATE—NEGOTIABLE INSTRUMENT.

The question at issue in *The London and County Banking Co.* v. *The London and River Platte Bank*, 20 Q. B. D. 232, was whether share certificates issued by an American railway company were negotiable instruments. The certificates in question purported to certify that H. & Co., the company's correspondents in England, were entitled to twenty shares "transferable only in person, or by attorney in the books of the company." Upon the back of each certificate was indorsed a power of transfer under seal, which was in effect an absolute transfer of the shares mentioned in the certificate, followed by an irrevocable power of attorney "to the use of the above-named assignee to make any necessary acts of assignment and transfer of the said stock in the books of the company" this was signed by H. & Co., the names of the transferor and attorney being both left blank. The object of the power was to enable an English holder to appoint an attorney to act for him in America, where alone a transfer could be registered. It was proved that when thus signed in blank these certificates, by the usage of English bankers and dealers in public securities, were transferred by mere delivery, and were dealt with like bonds payable to bearer, but it was held by Manisty, J., that the certificates were not negotiable instruments, and were intended to pass by transfer only, and not by mere delivery. At page 239 he says: "Now it seems clear to me that this instrument could not be sued upon by the person holding it *pro tempore*, and could not therefore be negotiable, because when it was handed over by the transferor with the blank power of attorney, it could not be sued upon by that person until it was transferred on the register."

GRANT OF RIPARIAN LAND—CONSTRUCTION—BED OF RIVER, AD MEDIUM FILUM—REBUTTABLE PRESUMPTION.

Devonshire v. *Pattinson*, 20 Q. B. D. 263, affords incidentally another illustration of the doctrine on which *Thomas* v. *Owen*, *supra*, to some extent proceeded. A grant of land on the bank of a river was made in 1846; at the time the grant was made a fishery existed in the river fronting the land, and at the time of the grant this fishery was under lease to tenants; the grantees and their successors in title had never, until the acts complained of in the action, claimed or exercised any right of fishing over the bed of the river, but the grantor or his tenants of the fishery had always fished since the making of the grant without interruption: and it was held by the Court of Appeal (Lord Esher, M.R., Bowen

and Fry, LL.J.), affirming the judgment of A. L. Smith, J., that the presumption that the grant included the bed of the river, *ad medium filum*, was rebuttable, and that the existence of the lease of the fisheries at the time the grant was made, was a fact which precluded the conveyance from being construed as passing any part of the bed of the river.

LIBEL—NEWSPAPER CRITICISM OF STAGE PLAY—QUESTION FOR JURY.

In *Merivale* v. *Carson*, 20 Q. B. D. 275, the Court of Appeal (Lord Esher, M.R., and Bowen, L.J.) affirmed the decision of Mathew and Grantham, JJ., refusing a new trial. The action was for libel of a play written by the plaintiff. The libel consisted in a criticism of the play, published by the defendant in a newspaper. It was contended by the defendant that the play, being a matter of public interest, the occasion was privileged, and the action would not lie except on proof of express malice. But the Court of Appeal held that there was no privilege, and that it is simply a question for the jury in such a case, whether the criticism has gone beyond the limits of fair comment; and that question having been submitted to the jury, and they having found in favour of the plaintiff, the court refused to disturb the verdict.

PRACTICE—EVIDENCE—AFFIDAVIT—CROSS-EXAMINATION.

Proceeding to the cases in the Probate Division, the first case calling for a passing notice is *The Parisian*, 13 P. D. 16, in which a point of practice is disposed of. Under Ord. 37, r. 2, evidence in references in admiralty actions may be given by affidavit, and it was held by Butt, J., that it is in the discretion of the Registrar to refuse, if he think fit, to give weight to such evidence unless and until the deponent has been cross-examined on his affidavit, and when the deponent is a party to the action, he may, though resident abroad, be required to attend in England for cross-examination.

ADMINISTRATION—GRANT TO CREDITOR—ABSCONDING ADMINISTRATOR—REVOCATION.

In the goods of Bradshaw, 13 P. D. 18, a grant of administration had been made to a creditor who, after his debt had been satisfied, had absconded and could not be found, and a personal representative of the estate being required in an action in the High Court, the Probate Division revoked the grant to the creditor without citing him, and made a new grant to the next of kin.

WILL—EXECUTOR ACCORDING TO THE TENOR.

The only other case in the Probate Division is *In the goods of Lush*, 13 P. D. 20, in which it was held that directions contained in a codicil to a person substituted as a trustee, to get in all the testator's property and to distribute it in a certain manner after payment of funeral and other expenses, constituted the substituted trustee an executor according to the tenor.

EASEMENT—LIGHT—PRESCRIPTION—RESERVATION IN LEASE OF RIGHT TO OBSTRUCT LIGHT.

Turning now to the cases in the Chancery Division, *Mitchell* v. *Canhill*, 37 Chy. D. 56, first claims attention. In this case a land owner granted a lease to the plaintiff of a house and land, with their appurtenants, except rights, if any, restricting the free use of any adjoining land, or the appropriation, at any time thereafter, of such land for building, or other purposes, obstructive, or otherwise. And it was held by the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) that the tenant might, notwithstanding the reservation, acquire under the Statute of Limitations, an easement to the enjoyment of light and air; and when more than twenty years after the making of the lease, a lessee of the adjoining land from the same landlord commenced to build in such a way as to obstruct the plaintiff's light, it was held the plaintiff was entitled to an injunction. The case is also worthy of note from the fact that an application for an interim injunction having, as the Court of Appeal held, been erronously refused, and the defendant having, in consequence, gone on and erected his building *pendente lite* it was held that the plaintiff, should he ultimately succeed in the action, would be entitled to a mandatory injunction for its removal.

FIXTURES—MORTGAGOR AND MORTGAGEE—LEASEHOLD.

Southport & West Lancashire Banking Co. v. *Thompson*, 37 Chy. D. 64, is a decision of the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), upon the construction of a mortgage of leaseholds, whereby it is determined that words which in a conveyance in fee are sufficient to pass trade fixtures, will have the same effect when the mortgage is of leasehold property by sub-demise, with this qualification, that in the latter case the absolute property in such trade fixtures as separate chattels, with the right to remove and sell them, will not pass to the mortgagee, unless an intention to that effect is apparent on the deed. A statement of Blackburn, J., in *Hawely* v. *Butlin*, 8 Q. B. D. 290, which apparently leads to the conclusion that the fixtures would not pass to the mortgagee of leaseholds, is explained.

LEASE—RESTRICTIVE COVENANTS—COVENANT NOT TO PERMIT NOISOME BUSINESS—UNDERLEASE—INJUNCTION.

Hall v. *Ewin*, 37 Chy. D. 74, is a case in which an unsuccessful attempt was made to extend the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774. The plaintiff demised a house for ten years to one Tarlington, subject to a covenant that the lessee, his executors, administrators and assigns, would not use the premises, or permit or suffer them to be used by any person for any noisome or offensive business. Tarlington granted an underlease of the house, which was assigned to the defendant Ewin. Ewin underlet the house to McNeff, who opened a wild beast show. The plaintiff brought an action for an injunction against both Ewin and McNeff to restrain the use of the house in that manner. There was no evidence that Ewin had consented to the use of the house, in the objectionable manner, and it did appear that after complaints had been made he had

requested McNeff to discontinue the exhibition. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), overruling Kekewich, J., held that under these circumstances Ewin was not liable for not taking active proceedings against McNeff to prevent the misuser of the premises. Cotton, L.J., thus expounds the principle of *Tulk* v. *Moxhay*, at p. 79: "As I understand *Tulk* v. *Moxhay*, the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants, the Court of Chancery would not allow him to use the land in contravention of the covenants," but he goes on to say that the Court of Appeal, in *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403, had held that the principle in *Tulk* v. *Moxhay* was not to be applied so as to compel a man to do that which would involve him in expense.

PRACTICE—WINDING UP—INSPECTION OF DOCUMENTS—R. S. C. c. 129, s. 81.

In re North Brazilian Sugar Factories, 37 Chy. D. 83, the Court of Appeal (Cotton and Lopes, L.JJ.) held, affirming Charles, J., that the power given by the Companies Act, 1862, s. 156 (R. S. C. c. 129, s. 81), of ordering inspection of the books and papers of a company in liquidation, is *prima facie* to be exercised only for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up, and will not in general be exercised for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters; and that the section only applies to books and papers in the possession of the company and the liquidator, and does not enable the court to determine any question of right against third parties having the books in their possession, and claiming to be entitled to such possession. In this case, after the winding-up order had been made, a scheme was presented for forming a new company; and, this being approved by the court, the assets and books of the old company were handed over to the new company. Upon the other point the court practically reaffirmed what they had previously laid down *In re Imperial Continental Water Corporation*, 33 Chy. D. 314 (noted *ante* Vol. 23, p. 28).

SOLICITOR AND CLIENT—LIEN ON FUND RECOVERED—ASSIGNMENT OF FUND BY CLIENT —PRIORITY.

In *Macfarlane* v. *Lister*, 37 Chy. D. 88, a client assigned, by way of mortgage, his interest in a fund in litigation, and at the time of the execution of the mortgage gave a written order to his solicitor, who also acted for the mortgagee, to pay the claim of the mortgagee out of the first moneys which should come to his hands of the fund in question, which he duly forwarded to the mortgagee. A part of the fund was paid into court, and the solicitor, having obtained a charging order for his costs, a question arose as to whether the solicitor or mortgagee was entitled to priority. And it was held by the Court of Appeal (Cotton and Lopes, L.JJ.), reversing the order of Stirling, J., that although the fact of the solicitor having acted for both parties to the mortgage, would not have prevented his claiming priority in respect of his lien; yet as he

had received the order from his client and handed it over to the mortgagee, that amounted to a viritual adoption of the letter, and precluded him from setting up his claim in priority to the mortgagee.

VENDOR AND PURCHASER—RESCISSION—FORFEITURE OF DEPOSIT, DEFECT IN TITLE SUBSEQUENTLY DISCOVERED—ACTION TO RECOVER DEPOSIT.

In *Soper* v. *Arnold*, 37 Chy. D. 96, the Court of Appeal (Cotton, L.J., Hannen, P.P.D. and Lopes, L.J.) affirm the decision of Kekewick, 35 Chy. D. 384, noted *ante* Vol. 23, p. 294. It may be remembered that this action arose under the following circumstances: The plaintiff had agreed to purchase a parcel of land from the defendant, and paid a deposit of the purchase money. He accepted the title and prepared the conveyance, but when the time for completion arrived he was unable to raise the rest of the purchase money, and in pursuance of the conditions of sale, rescinded the contract, and three years afterwards the vendor resold the property. Upon the investigation of the title upon this re-sale, a fatal defect was found in the title, and the first purchaser then brought the present action to recover his deposit. But the Court of Appeal held that he was not entitled to recover. It may also be observed that Cotton, L.J., takes the same view of the case of *Hart* v. *Swaine*, 7 Chy. D. 42, as was recently taken by Ferguson, J., in *Cameron* v. *Cameron*, 14 Ont. R., 582 *et seq.*

TRADE MARK—REGISTRATION—DISTINCTIVE DEVICE.

In re Hanson's Trade Mark, 37 Chy. D. 112, Kay, J., held that a trade mark of which the only distinction is its colour cannot be registered. Thus a red, white and blue label, with the words "red, white and blue" printed across it, was refused registration as a trade mark.

LEASE—EXECUTOR TAKING POSSESSION OF LEASEHOLDS OF TESTATOR—MEASURE OF LIABILITY.

In re Bowes, Strathmore v. *Vane*, 37 Chy. D. 128, North, J., discusses, at considerable length, the measure of liability of an executor who enters into possession of leaseholds to which his testator died entitled, and comes to the conclusion that he is personally liable for the rent subsequently accruing, up to the actual letting value of the demised premises during that period, whereas the lessor's right as against the testator's estate would be merely to prove his claim for the whole amount of the rent, and to be paid as any other creditor is paid. But the learned judge held that the personal liability of the executor could only be enforced by action against him, and that such relief could not be granted in an administration suit except with the consent of the executor.

HUSBAND AND WIFE—FEMALE WARD OF COURT—COSTS OF SETTLEMENT.

The simple point decided in *De Stacpoole* v. *De Stacpoole*, 37 Chy. D. 139, was that when on the marriage of a female ward of court a settlement of her property was ordered, the costs of all parties, including the husband, of such settlement should be paid out of the *corpus* of the settled property.

PRACTICE—MOTION FOR JUDGMENT IN DEFAULT OF DEFENCE—RELIEF NOT CLAIMED.

Kingdon v. *Kirk*, 37 Chy. D. 141, is a decision of North, J., following *Gee* v. *Bell*, 35 Chy. D. 160, to the effect that where an action is heard in default of defence, judgment cannot be awarded for relief not claimed by the statement of claim. The action was for specific performance by a vendor. On the motion for judgment, the plaintiff asked simply a declaration of rescission, and the learned judge was of opinion that if that declaration were made the plaintiff ought to be ordered to pay the costs of the action, but as he had not, in fact, claimed by the statement of claim such relief, it could not be granted.

WILL—APPOINTMENT—REVOCATION—WILLS ACT (1 VICT. C. 26, S. 27)—R. S. O. 1887, C. 109, S. 29.

In re Gibbes, White v. *Randolf*, 37 Chy. D. 143, a testator executed a "testamentary appointment" under a general power. A month later he executed a will containing a residuary bequest, and not referring to the testamentary appointment. North, J., held that the will operated as an execution of the power, and as a revocation of the previous testamentary appointment. This is the second case, recently, in which the operation of the Act has had the effect of frustrating the obvious intention of the testator. See *Re Jones*, 34 Chy. D. 65, noted *ante* Vol. 23, p. 67.

INFANT—MARRIAGE SETTLEMENT—OMISSION—MISTAKE.

Mills v. *Fox*, 37 Chy. D. 153, is a decision of Stirling, J. By a settlement made in 1884 an infant, with the sanction of the court, executed a marriage settlement of certain property upon her marriage. As to part of this property she was entitled in tail, and, with the sanction of the court, she executed a disentailing deed for the purpose of vesting the property in the trustees of the settlement. It was afterwards discovered that this part of the property had in fact been expropriated, and the purchase money therefor had been paid into court. The marriage took place, and the lady in 1885 attained 21, and then disentailed the fund in court, and claimed to be absolutely entitled to it free from the settlement. But Stirling, J., held that, although the disentailing deed of 1884 was not effectual to bar the estate tail of the lady in the fund in court, and though in the absence of a contract binding the lady to settle the entailed estate, the settlement could not be rectified, yet inasmuch as the marriage and the settlement were sanctioned by the court on the faith of representations made on the lady's behalf, that she was entitled to the entailed property, the purchase money of which was represented by the fund in court, she was bound in equity to make good such representation, notwithstanding her infancy at the time it was made; and that, having now disentailed the fund and thus become the only person besides the trustees of the settlement who could claim any interest in it, she was precluded from setting up any title to it adverse to the trustees, who were therefore held entitled to the fund.

Reviews and Notices of Books.

The Land Titles Act, being chapter 116 *of the Revised Statutes of Ontario,* 1887, *with New Rules, Tariff of Fees, and References of Rules and Forms.* Toronto: Warwick & Sons, 26 and 28 Front Street West. 1888.

The little volume before us is simply a separate print of "The Land Titles Act," as settled by the commissioners who revised the Statutes of 1887. Its issue in this form will be found a great convenience to the increasing numbers who are interested in lands under this Act, as the Master of Titles has taken occasion to append foot-notes, with references to the rules and forms. The Act has been, to a considerable extent, re-arranged, and a number of amendments made, some of which we think will be found to aid in the practical working of the system.

We notice that all the provisions showing the various classes of persons who can apply for first registration are now collected together, instead of some being found at the beginning and others at the end.

Under section 8 there is given to a mortgagee whose mortgage is in default, and who has a power of sale, the right to apply to have the owner of the equity of redemption registered under the Act as owner. Where titles are somewhat complicated there is no doubt this will be of great benefit, and is an improvement upon the former clause, which authorized a mortgagee to apply to have himself registered, as it shows the title in accordance with the fact, and gets rid of embarrassments which attended the old provision. By section 28, the objects for which a "charge" may be given are very considerably enlarged. Under the former Act the charge could only be made for securing the payment of a *sum of money*, payable at an appointed time. Now it can be given as a security for any purpose for which it is deemed advisable to give it. By section 55 the necessity of a caution to preserve a Mechanics' Lien has been abolished, and the ordinary procedure under the Mechanics' Lien Act adopted, a reference to the number of the parcel under which the land is registered being, however, required.

We also notice a very important provision respecting trusts. It is, of course, absolutely necessary, in accordance with the principles of the Torrens system, that no enquiry should be requisite in respect of the performance by a trustee of his duty, and in order to accomplish this it is provided in the English Act that there should not be entered on the registry, or be receivable by the Master of Titles, any notice of trust, express, implied or constructive. By section 85 of the revised Act, it is now declared that describing the owner of any land or charge as a trustee, whether the beneficiary, or object of the trust, is mentioned or not, shall not be deemed a notice of trust within the meaning of this provision, and that this description shall not impose upon any person dealing with such owner the duty of making any enquiry as to the power of the owner in respect to the

land, or charge, or the money secured by the charge, or otherwise. We think this useful provision might, with manifest advantage, be extended so as to be part of the general law.

We also notice that several of the forms have been redrawn and simplified. The pamphlet contains a tariff of fees enacted by the Governor in Council, and an exhaustive index.

Notes on Exchanges and Legal Scrap Book.

THE LAWS' DELAYS.—People are prone to complain of the delay which so often ensues when a case goes to the Court of Appeal of this province. They may be thankful that they have not to abide the issue of an action in the Supreme Court of the United States. The business of that court is now rather more than three and a half years in arrears, so that cases entered early last year cannot, in the usual course of events, be decided by that august but tardy tribunal before the end of 1890. The constitution and jurisdiction of the court were established a century ago, when the population of the United States was less than one-fifteenth part of its present population, and its area about a fourth of its present area. The number of cases on the docket each year has increased during the last half century about fourteen fold, and all the signs point to a further increase. A remedy will have to be provided soon for this condition of affairs.

THE ENGLISH LAW SCHOOL IN JAPAN.—In our "Notes" in our May-June number, 1886, we published a long report of the Tokio English Law School, with comments thereon, which we learn were read with great interest by the legal profession in Japan. Since then, as we are informed, the school has grown in popularity to such an extent that its present buildings are inadequate to accommodate the students, who now number nearly 1,800. With the exception of an English barrister and Mr. Scidmore, our Vice and Deputy Consul-General, all of the lecturers are Japanese lawyers (about twenty-five in number), many of whom were educated and admitted to the bar in England or the United States, and the majority are graduates of the Imperial University, having been instructed by American professors of law. Up to the present their services have been given to the school gratuitously, and the income from tuition fees has been applied to the collection of a law library, and the purchase of land and erection of buildings. New and commodious quarters of brick are now in course of construction in one of the best localities in Tokio, and the Imperial Department of Education, in appreciation of the value of this institution, has lately made an annual grant to its promoters of 5,000 yen ($3,920).—*American Law Review.*

PERJURY A CONTEMPT OF COURT.—Perjury, apart from the penalty due to it as an indictable offence, is punishable as a contempt of court. We learn from the *Chicago Legal News* that Judge Pendergast committed Leopold Newhouse for ten days for contempt of court in testifying falsely in a matter before the court, and deferred the execution of the sentence for fifteen days on account of the illness of Newhouse's wife. Bail was taken for his appearance at the time named. The punishment, of course, is not for the crime of perjury, but for the imposition upon the court. Every court has the power to protect itself from imposition. The offender may still be indicted and punished for perjury. Judge Bradwell, when he was judge of the same court, committed a culprit to jail, and kept him there for one year, for pretending to die, and imposing upon the court by having his will presented for probate, so as to obtain a large sum of money for which his life was insured.

VICIOUS ANIMALS.—The Supreme Court of New Jersey held in *State* v. *Donohue*, that if an animal having no natural propensity to be vicious, commits an injury to the person of another, the owner is not liable unless he had previous knowledge of the vicious disposition. The fact that the owner of a dog permitted him to be at large on the highway when he inflicted the injury sued for, will not make the owner liable without proof of the *scienter*. We glean from an exchange that the facts were as follows:—The plaintiff, while walking on the public street in front of the defendant's premises, was bitten by the defendant's dog, which was lying unmuzzled on the sidewalk. Owing to the darkness of the night, the plaintiff did not see the dog until he sprang up and bit her. It also appears that a city ordinance prohibited the running at large of dogs in the street at any time without a muzzle. The plaintiff argued that the dog, lying on the sidewalk, contrary to the city by-law, was a nuisance, and the owner therefore liable. The court, in giving judgment, cited numerous English decisions concurring in the view that a dog is not of fierce nature, but rather the contrary, and that a demurrer to a declaration, which did not allege the defendant's knowledge of the vicious propensities of the animal, should be sustained. The American decisions support the same view. The court, in giving judgment, said that it might be that if the plaintiff, while on her way in the public streets, had unavoidably fallen over the dog, and thereby injured herself, the owner of the dog would have been liable in damages for such injury.

MARRIED WOMEN AND CREDITORS.—The opinion of the Supreme Court of Pennsylvania, delivered by Gordon, J., in *Blum* v. *Ross*, reported in the *American Law Register*, sustained the finding of an inferior court wherein it was held that where an insolvent opened a store and carried on business in the name of his wife, who signed for goods purchased, certain notes subsequently paid out of the proceeds of the business, but was not further known in the business, the obvious use of the wife's name was to defraud creditors. The Supreme Court held that

the refusal of the court below to submit the case to a jury was not erroneous. The court said that were the judgment of the court below to be reversed, then it would have to be admitted not only that a wife might acquire and hold property on her personal credit, but also that she might have and own, even as against creditors, the labor and earnings of her husband. The case did not come within the Act to protect the earnings of married women, for she had no such earnings. It is true she owned a house and lot, but she did not obtain the goods on the credit of that estate. The vendor was ignorant of its existence. The law of the State, as laid down in *Seeds* v. *Kahler*, is that while a married woman may buy goods on credit, it must be on the credit of her separate estate, and as against the creditors of her husband she must affirmatively establish that fact; though when she owns property sufficient in value to serve as the foundation of a credit, direct proof that the credit was based on it may not be necessary, for the jury may infer the fact from the circumstances surrounding the transaction. In the present instance there were no such circumstances as would warrant such an inference. Personally, beyond the signing of the notes, she was not known in the business. The whole matter was conducted by the husband, and without the slightest reference to her estate. The court below could not be be convicted of error in refusing to submit to the jury a case so wholly unsupported by facts.

Since the decision of the above case a new Act has been passed by the State of Pennsylvania, which provides that marriage "shall not be held to impose any disability on, or incapacity in, a married woman as to the acquisition, ownership, possession, control, use, or disposition of property of any kind in any trade or business in which she may engage." There are, however, two restrictions: one is that she cannot mortgage or convey real estate without her husband joining in the mortgage or deed; the other is that she shall be unable to become accommodation endorser, guarantee, or surety for another.

SEARCHING WITHOUT A WARRANT.—The English *Law Journal* gives an account of an unreported case in the County Court, wherein the right of police constables to search the premises of a person suspected of theft, though they had not a search warrant, was in issue. There had been a robbery of poultry from the premises of F., and information of it was given to the police. Certain footprints were found at a distance of five or six hundred yards from the scene of the theft. On the same night there had been an attempted robbery from a neighbouring house. The footprints were traced thither, and thence to the plaintiff's house. They were principally along a footpath which the plaintiff frequently traversed. The officers went in plain clothes, and, without a warrant, searched the plaintiff's house and out-houses. No charge had been made against the plaintiff. The counsel who argued the case said they could find no authority expressly in point, and his Honour Judge Jordan, failed to find a case decisive of the point, but on the analogies of other decisions, on general principles of law, and on the opinion of text-writers, he based his decision in favour of the plaintiff. "Every man's house is his castle" is an old maxim, against any

infraction of which the law guards jealously. Wigram, in the Justices' Note-Book, says "That a search-warrant is issued on an information upon oath." Addison on Torts says "That if a warrant is issued, and a search made without due authority on the part of the magistrate, it amounts to a trespass." In *Curzon* v. *Cundy*, 9 D. & R. 224, a constable was held to be a trespasser for taking some goods of the prosecutor's which were not mentioned in the warrant. Other authorities supported the same view. The contention of the defendants, that they were in a position similar to that of an officer who arrests a person on suspicion of felony, was not sustained. No stolen goods were found upon the premises; and, in the opinion of the learned judge, the constables had no reasonable cause to suspect that the goods stolen from F. were in the plaintiff's possession.

THE FUSION OF THE LEGAL PROFESSIONS.—Our English and Irish contemporaries are engaged in a discussion about the fusion of the legal professions. The suggested change has its warm advocates, and its earnest, almost bitter, opponents. The Solicitor-General, in a speech at Birmingham, urged the advantages of the suggested union, basing his advocacy on the ground that the present system is so expensive that it amounts to a positive denial of justice to all who have not abundance of money. It is contended by the supporters of fusion that it would be much cheaper for the poor man to employ a solicitor, having the right to represent him in all the courts, than to fee an advocate too. This need not take away from the rich man desirous of having an advocate of long experience and high standing, the privilege of being represented by counsel as at present. On the other hand it is contended that the effect of the proposal, if carried out, will be to cut down the bar to a few practitioners who have gained distinction as advocates, to secure for the rich man the practised advocate, and to leave the poor man to content himself with a solicitor insufficiently experienced in forensic work. It is asserted that, if the privileges of the bar are abolished, the poor man will have no advocate, because without those privileges few would care to adopt the bar as a profession.

To us in Canada, who have had long experience of the benefits resulting from the union of the functions of barrister and solicitor, the discussion is a reminder that the people of the old land have yet some problems to work out which were long ago successfully solved in the colonies.

The contention implied, if not expressed, that the present arrangement can secure for the poor man as able advocacy as can be obtained by his wealthy opponent, is contrary to experience and utterly untenable. The duality of the profession signally fails to do that, and it must materially increase the expense of litigation. It is interesting to note, too, that the discussion shows a growing sentiment in favour of brushing away the cobwebs, and laying bare gross cases of delay and injustice.

The profession and the legal publications, notably the English *Law Journal* and the Irish *Law Times*, have given much attention to the controversy. *Punch* has seized on the comical aspect of the evils feared by the opponents of a united

profession, and gives the following pen-picture of them, a picture all the more laughable that the evils are visionary:—

SCENE.—*Interior of the Royal Courts. An appeal being heard. Judges on the Bench. Members of the Combined Profession occupying seats once monopolised by the Bar.*

First Judge (addressing Small Advocate).—We are not quite accustomed to the new state of things, but is it not usual for Barsolistors to wear robes?

Small Advocate (aged 16).—B'leeve 'tis m'Lud; but, fact is, I am here on behalf of Mr. Jones, the Barsolistor, who is away serving a writ on a client, who requires special attention.

First Judge.—I suppose you are Mr. Jones's managing clerk?

Small Advocate.—No, m'Lud. Mr. Brown, Mr. Jones's managing clerk, is engaged in Chambers before a chief clerk, who is settling the remuneration of a receiver. Very important matter, m'Lud.

First Judge.—Then, who are you?

Small Advocate.—I am one of Mr. Jones's junior clerks, m'Lud.

First Judge.—And what are your duties?

Small Advocate.—Well, m'Lud, usually to assist in the sweeping out of the office, the writing of the addresses on the envelopes, and such like. When I'm not doing that, I have the pleasure of addressing your Ludships.

First Judge.—Has a junior clerk who assists in sweeping out the office as an ordinary duty the right of audience?

Second Judge (after consulting authority).—Clearly. (He points out passage to his colleague.)

First Judge (addressing Small Advocate).—I see that you have the right of audience. You can proceed.

Small Advocate.—Thank you, m'Lud. As I was saying when your Ludship was kind enough to interrupt me—as I was saying, the other day I was reading a law book in master's chambers—

Second Judge.—Can you give the name of your authority?

Small Advocate.—Well, m'Lud, to tell you the truth, I quite forget. I fancy it was Richards or Roberts, or somebody who had a Christian name for a surname. The book was all about "Substantial Estates," I think. Yes, I fancy it *must* have been—"Roberts on Substantial Estates." Something like that, you know, m'Luds.

First Judge.—Could it have been "Williams on Real Property?"

Small Advocate.—Why, I do believe, m'Lud, you have hit the nail on the right head! Well, m'Luds, I read in this here book that waste was quite different in law than in fact. So I believe my client was only exercising his just right when he cut down the wood in rear of the premises. He never wasted it, m'Lud, but sold it at a good price. (Argues for an hour or so.)

First Judge (at end of argument).—We shall give our decision on Tuesday week. (Dead silence.) Is there no other matter?

Aged Barsolister.—Hem—ha—ho. B'leeve, m'Lords, no other case ready. Fact is, m'Lords—hem—ha—ho. Counsel otherwise engaged. Fact is, m'Lords—hem—ha—ho. One Barsolister is finishing a bill of costs, another receiving instructions about a marriage settlement, and—hem—ha—ho—and a third examining securities in a box at the bank. My own learned leader, Mr. Silvertongue, Q.C., is at this moment—hem—ha—ho—particularly engaged. Fact is, m'Lords, Mr. Silvertongue, Q.C., is acting as a man in possession during the temporary absence of the representative of the Sheriff.

First Judge.—As there appears to be nothing further on the paper, we must adjourn, but I cannot help pointing out that the mixing of functions, once kept distinct, causes at times considerable inconvenience. (Scene closes in on the adjournment.)

DEATH OF SIR HENRY MAINE.—Sir Henry James Sumner Maine, who died on February 3rd, was born in 1822. He was educated at Cambridge, where he won distinguished honours in his university course, and he was afterwards a tutor of Trinity Hall. He held his tutorship for two years, and then, at the unusually early age of twenty-five, was appointed Regius Professor of Civil Law. He was appointed Reader in Jurisprudence at the Middle Temple in 1854, having been called to the bar four years earlier. He was also a legal Member of the Council of the Governor-General of India. It is as an author that this distinguished jurist has rendered his most valuable and permanent services. His "Ancient Law," "Village Communities," and "Early History of Institutions," are marked by depth and originality of thought, scholarly and accurate research, and high literary merit. His labours have thrown much light on the foundations of jurisprudence. The following estimate of him by Rev. H. Latham, also of Trinity Hall, Cambridge, we take from the English *Law Journal*:

"Sir Henry Maine never thrust himself forward; there was no dogmatism about him, neither was there the least trace of intellectual coxcombry or of looking down on tastes and pursuits which differed from his own. He never said a caustic or an unkindly thing. Even in those days he was remarkable for a mental quality for which I have no English word. He would lay his mind so close against the matter that was presented to him that he seemed to take off from it an impression accurate even to the faintest lines. His reputation," he concluded, "will grow with years, because he has enriched the world with new ideas, and pointed out sound methods of carrying on investigation. He helped men to understand their institutions, and started them on right tracks of thought. Many names which now are as well known as his will pass out of mind while his will be left to fame."

Correspondence.

LAW SCHOOL.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—I understand that a scheme for the "establishment and maintenance of a law faculty" is now under consideration by the benchers in connection with the University of Toronto, and that proposals on the subject have been made by a joint committee of the Law Society and the Senate of the University.

As this scheme emanates from a committee on which "Toronto" was the only university represented, it is, perhaps, quite natural to find that it gives her an advantage over the other universities, which is scarcely fair to the members of the Law Society who are interested in the latter or not in sympathy with the former.

Convocation, however, has very wisely determined that the other universities shall be consulted before the matter is finally disposed of; and no doubt such amendments will be made as will enable all the universities in the Province to avail themselves, if they so desire, of a federation with the Law Society for the objects in view. That, however, is a question in which the universities are more interested than the legal profession. What the latter must be assured of before the scheme receives their endorsation, is that it will really afford an improvement in the character of legal education. When we compare the scanty course of lectures provided by our Society with the well-equipped law schools existing in many of the neighbouring states, and even in some of the smaller provinces of Canada, it must be admitted that we are not keeping pace with the age, or giving our students the same educational advantages as are enjoyed elsewhere. I wish, therefore, to record my sympathy with the movement in the direction of reform, while regretting that I cannot approve of the present recommendations. The following, among other objections, suggest themselves:—

1. The scheme entirely destroys the incentive which has hitherto existed to men taking the arts course in a university, before entering upon the technical study of law. Hitherto, a graduate in arts has been allowed to shorten the prescribed period of preparation for the bar by two years. Under the proposed change, which offers a student in four years an university degree in law, with all the incidental advantages of an arts degree, and makes him at the same time a barrister and solicitor, it is extremely improbable that many will devote three years to graduating in arts, three more to becoming entitled to practice, and have to take a still further course to attain a degree in law. There are but few, I think, who deny that a course in arts is highly desirable for those intending to enter the legal profession. A large proportion of the barristers who, of late years, have attained to positions on the bench, both in England and this country, are distinguished graduates of their universities, and no more notable example of the satisfactory result of such a training can be given than that afforded by the learned and scholarly judge who signs the report of the committee. The desirability of the general adoption of the course of study, which has produced such men as the Chancellor of Ontario, has been time and again advocated in eloquent speeches, delivered on educational and scholastic occasions, by the great lawyer, who is the head both of his profession and university, and I do not believe any of the committee will advocate a deviation from his advice.

2. It is true that the scheme (section 17) provides that nothing therein contained is intended to interfere with the existing regulations for call, and that, therefore, the bachelor of arts will still be able to become a barrister-at-law after three years' study. This is very much like providing dinner for the victim to whom you have administered an effectual poison. If, however, any of this class of law students should survive the premium offered for his extinction, he will be deprived of the opportunity for legal instruction, which he enjoys under the present regulations. In common with all other students, he has now the benefit of a complete course of lectures for three years of study, but, under the proposed scheme, he will have to content himself with the incomplete course of two years,

which the Law Society will dovetail into the university curriculum for the four years' students. As he will continue to pay the same fees as hitherto, this is, I think, a most unfair treatment of a class of students, from which the records of the past show that it is at least as advisable as from any other to draft the future lawyer.

3. The period which will be spent under articles is ridiculously short. Those of us who have been articled for a term of three years know how difficult it was to gain in that time an insight into the practice of the profession, and no one has ever heard even a five years' man assert that he had learnt more than was requisite to conduct a solicitor's business, with some degree of confidence in his own skill. Will a two years' dabbling by a schoolboy of sixteen in the depths of international law and Roman jurisprudence open a royal road to the imbibing of this knowledge in two brief years?

4. The question should, perhaps, be looked at solely from the students' point of view, and it may not be a proper subject for consideration, that the solicitor can no longer expect to derive from his articled clerk the assistance which he now enjoys from a student in his third, fourth, or fifth year. At the same time, we must bear in mind that the advantage is a mutual one, and the student who can floor his principal on the "Institutes," but render him no assistance in "the running of a suit," will not have the chance of deriving from his seniors those practical lessons which are so much more thoroughly taught and so much more easily learned by participation with a skilled practitioner in his actual work.

5. What I have said in regard to the short space allotted to acquiring a knowledge of practice, applies with still greater force to the study of the subjects, a knowledge of which should be acquired by a barrister before call. I do not understand that it is, nor do I well see how it could be, proposed to lessen the number of those subjects. If then the most diligent application to study for five, or in the case of more matured and trained intellects, for three years, barely suffices to acquire a knowledge of the elementary doctrines of law and equity, the learning of real property and the principles of evidence, as set out in the numerous text-books on the curriculum of the Law Society, is there any reason for hoping that this knowledge will be more thoroughly mastered in the short period of two years? or can we expect that the student who finds it hard enough to read the work required for call in five years will be able to read both that and the work required for a degree of LL.B. in four years?

6. Then, too, is not the natural order of study completely reversed by the proposed scheme? Can a boy of sixteen, fresh from school, intelligently pursue a course of reading in civil law, constitutional law and history, and international law, without some of the elementary training, which it is proposed to postpone until the last two years of his course? It seems very much like requiring mathematical students to devote their first year to the calculus, and their third to algebra.

7. Then after all, what is gained by inducing the students to crowd into a four-year cram what should be the subjects of double that period of matured intelligent study? By the rules of the Society (s. 5, ss. 10), a person can be

admitted as a student and articled clerk at the age of sixteen, and by the Act Respecting Barristers (R. S. O. c. 179, s. 1, ss. 1), he must be of the age of tweny-one years before he can be called to the bar, or admitted to practice as a solicitor. Therefore, the student who puts in his four years under the proposed scheme, will have a year after its conclusion, and before he can enter into the work of his profession, in which he will have nothing to do.

No doubt that year could be profitably employed by a probationer so inclined, but are not the chances very great that, emerging from a period of enforced discipline, freed from the obligation of his articles, and with no settled aim or occupation, he will enter on the enjoyment of a year's holiday, which will mar many a promising career. Far wiser would it be for the Society to arrange that the whole period of five years, from the enrolment of the student to the call of the barrister, shall be spent, as at present, in the systematic acquirement of that knowledge, both practical and theoretical, which is to be his future stock-in-trade.

There are other objections to the proposed scheme which I could point out, but I find I have already trespassed too much upon your space. I would, however, in closing, humbly submit to the committee that the basis of their reform is a wrong one. Improvement, I freely admit, is desirable in the course both of the Society and the universities, but have they not each a distinct field of work which cannot be profitably amalgamated? To the Law Society is committed the charge of supplying such instruction as will fit a man for the practical work of the lawyer, be he barrister or solicitor, while to the university it would appear fitting to encourage the scientific study of the principles of law. Let each equip itself for its own work, and hold out its honours and rewards for proficiency in its own branch, and we shall then have skilled practitioners emanating from the one and learned authors from the other; but let us not, by making a jumble of the work of both, produce men of whom in a limited sense it may be said that they are "Jacks of all trades and masters of none." Why should the Law Society resort to any other institution for assistance in the objects of its incorporation? It has hitherto been an autonomous body. Is it wise to invite interference from outside? Surely out of its ample revenues more could be afforded for the purpose of legal instruction than the paltry salaries of the present lecturers! And if not, why should lawyers alone of the three learned professions expect to obtain their education for nothing? Why should not the law student, like his medical brethren, pay well for the lectures which he requires.

Yours, etc.,

J. A. WORRELL.

DIARY FOR MARCH.

1. Thur ...St. David.
4. Sun.....*3rd Sunday in Lent.*
5. Mon....Holt, C.J., died, 1710, æt. 65.
6. Tues....Court of Appeal sits. Gen. Ses. and C. C. sittings for trials in York. York changed to Toronto, 1834.
11. Sun.....*4th Sunday in Lent.*
13. Tues....Lord Mansfield born, 1704.
17. Sat.....St. Patrick's day.
18. Sun.....*5th Sunday in Lent.* Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
19. Mon....P. M. Vankoughnet, 2nd Chancellor, 1862.
25. Sun.....*6th Sunday in Lent.*
28. Wed....Lord Romilly appointed M.R., 1851.
30. Fri.....Good Friday. B.N.A. Act assented to, 1867. Reformation in England began, 1534.

Reports.

[Reported for the CANADA LAW JOURNAL.]

Re HARRIS.

Quieting Titles—Advertisement—Posting at wrong Court House—Irregularity, waiver of—R. S. O. c. 113, *ss.* 45-46, *Chy. O.* 504.

Where the advertisement in a Quieting Title proceeding was posted at the Court House nearest the land in question, instead of at the Court House "of the county where the land lies," as required by Chy. O. 504.

Held, that the irregularity might; under R. S. O. 1887, c. 113, ss. 45-46, be waived.

[BOYD, C.—Feb. 25.

This was a proceeding under the Quieting Titles Act, in which the Referee of Titles at Toronto had given the usual direction for posting a copy of the advertisement at the court house, as required by Chy. O. 504. By mistake of the petitioner's solicitor the advertisement was posted at the court house of Dufferin, which was nearest to the land in question, instead of the court house of Peel, in which county the land was situate.

Upon the matter being submitted to the Chancellor by the Referee, he directed the objection to the regularity of the publication of the advertisement to be waived, having regard to the provisions of R. S. O. c. 113, ss. 45-46.

Elgin Myers, petitioner's solicitor.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [Feb. 6.

REGINA *v.* BEEMER.

*Criminal law—Quashing conviction—Forum—O. J. Act—Canada Temperance Act—Police magistrate—Adjudication outside of territorial jurisdiction—*41 *Vict. c.* 4, *s.* 9 (*O.*).

The jurisdiction to quash convictions was, at the time of the passing of the Ontario Judicature Act, in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exercisable by them respectively sitting in term; the Courts or Divisions of the High Court of Justice, mentioned in ss. 3 of s. 3 of the Act, can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective courts or divisions are analogous to and represent the sittings of the former courts of common law in term, and it is to the sittings of these courts or divisions that applications to quash convictions must now be made, having regard to the provisions of s. 87 and rule 484 of the O. J. Act, and of R. S. C. c. 174, s. 2, ss. 1, and s. 270. These courts or divisions are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. Sec. 28 of the Act, upon which the supposition that a single judge sitting in court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only.

And where a single Judge sitting in court heard and determined a motion to quash a conviction, an appeal to the judges of the Queen's Bench Division refusing to quash such conviction, was treated as a substantive motion to quash the conviction.

The police magistrate for the county of Brant, whose commission did not include the city of Brantford, convicted the defendant of an offence against the Canada Temperance Act, committed at a place in the county, outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made, in the city of Brantford.

Held, that the magistrate had no jurisdiction to adjudicate in the city of Brantford; and that what he did was not authorized by 41 Vict. c. 4, s. 9 (O.).

The conviction was before the Act 50 Vict. c. 2, s. 7 (O.)

Irving, Q.C., *Moss*, Q.C., and *Delamere*, for the Crown.

Mackenzie, Q.C., for the defendant.

Street, J.] [Feb. 27.

WICKENS *v.* MCMEEKIN.

Principal and surety—Limited term of employment of principal—Subsequent extension—Construction of bond—Estoppel.

M. having been employed by the plaintiff as a sub-agent in the collection of money, etc., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M., and was conditioned that if M. should from time to time, and at all times thereafter, account and pay to the plaintiff, etc., and at all times during such period as he should act as agent, etc., pay all sums received, etc., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond, and was only till the 31st December, 1884; but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M., by subsequent arrangement, continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886.

Held, notwithstanding the want of knowledge on the part of the sureties that the appointment recited in the bond must be taken to have referred to the appointment made before its date, and that the creditor and the principal could not, by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period did not justify the position that the sureties must have contracted with a view to a subsequent extension.

A letter was written by one of the sureties to the plaintiff on 17th December, 1886, in which he notified the plaintiff that from that date he withdrew his suretyship.

Held, that this could not estop the surety from denying his liability; and, even if it was to be read as showing that the surety assented to the continuation of the employment of M., it was immaterial.

Kitson v. *Julian*, 4 E. & B. 854, and *Sanderson* v. *Aston*, L. R. 8 Ex. 73, followed.

Robinson, Q.C., and *J. P. Galt*, for the plaintiff.

Moss, Q.C., and *A. D. Cameron*, for the defendants.

Practice.

Street, J.] [Feb. 7.

BANK OF HAMILTON *v.* BAINE.

Reference—C. L. P. Act, s. 197—Powers of Local Master—Absconding Debtors' Act, ss. 8 and 9.

Local masters have no greater powers in matters coming before them in Chambers, under the jurisdiction given them by the Ontario Judicature Act and 48 Vict. c. 13, s. 21, than those conferred upon the Master in Chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A local master has, therefore, no power to make an order to proceed against an absconding debtor, upon default, after service of the writ of attachment, where such order contains a clause directing a reference under s. 197 of the Common Law Procedure Act. It is intended by ss. 8 and 9 of the Absconding Debtors' Act that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, where an order of reference is necessary, the order to proceed must be made by a judge who has jurisdiction to refer causes. The ex-

pression "the referring of causes under the Common Law Procedure Act" is not restricted to causes which have been begun by writ of summons.

Watson, for plaintiffs.

Aylesworth, for defendant.

MacMahon, J.] [Feb. 10.

REGINA *v.* DALY.

Criminal law—Conviction for vagrancy—Nature of offence.

The Act, R. S. C. c. 157, s. 8 (*f*), provides that "all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers are loose, idle or disorderly persons within the meaning of this section." The defendant was convicted and committed for that he "unlawfully did cause a disturbance in a public street by being drunk, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants."

The evidence disclosed that the defendant was drunk, and that he was guilty of impeding and incommoding peaceable passengers, but it negatived his causing a disturbance in the street by being drunk.

Held, that no offence of the nature described in the conviction and commitment was committed by the defendant, and an order was made for his discharge.

Delamere, for the Crown.

Morson, for the defendant.

Armour, C. J.] [Feb. 15.

BECKETT *v.* GRAND TRUNK RAILWAY CO.

Judgment—Date of entry—Rules 326, 327, 527 (*b*).

Although by rule 527 (*b*) judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet when signed, the entry of it, if the Divisional Court pronounces no different judgment from that of the trial judge, ought to be dated as of the day on which it was pronounced by the trial judge.

Rule 326 applies to all cases whether tried by a judge, jury or otherwise, in which the judgment is pronounced by the court or a judge in court, and rule 327 applies to cases in which the judgment has not been pronounced by the court or a judge in court.

Where the judgment pronounced by the trial judge upon the verdict of a jury was varied by a Divisional Court,

Held, that judgment should be entered as of the date on which the Divisional Court pronounced judgment.

Folinsbee, for the plaintiff.

Aylesworth, for the defendants.

Chy. Divisional Court] [Feb. 21.

GALL *v.* COLLINS.

Costs—Taxation—Solicitor's lien on fund—Locus standi of attaching creditor—Solicitor's negligence—Discretion of taxing officer—Certificate of taxation.

G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C. as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue,

Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C. and the other as against G., if he succeeded in the issue.

The Court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor of proceedings which had been set aside in the action as irregular, and as to which G. alleged negligence and want of skill.

An informal certificate of taxation was written at the end of the bill of costs, showing

that it was taxed at so much, initialled by the taxing officer, and marked "filed" in his office.

Held, that this was not a sufficient filing of a certificate of taxation for the purposes of appeal to satisfy the rule laid down in *Langtry* v. *Dumoulin*, 10 P. R. 244.

McCallum v. *McCallum*, 11 P. R. 179 distinguished.

Street, J.] [Feb. 25.

INTERNATIONAL WRECKING CO. *v.* MURPHY.

Company—Shareholders—Use of corporate name in litigation.

A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve. The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, showing no reason why the company had not instituted the proceedings, could not be sustained.

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property.

Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others except the defendants, against the company and the majority of the shareholders.

C. J. Holman, for plaintiffs.

Hoyles, for defendant.

Chy. Divisional Court.] [Feb. 21.

MCLENNAN *v.* GRAY.

Appeal from Master's ruling—Time—Reading depositions taken on former application.

An appeal from the ruling of a Master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling.

In a mortgage action there was a reference to a Master for sale, etc. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in court, which R. G. applied to the Master to have paid out to her. Upon such application R. G. was examined before the Master, who refused the application. An order was afterwards made by a judge referring to the Master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the Master ruled that the depositions of R. G. taken upon the former application could be read.

Held, reversing the decision of ROBERTSON, J., in Chambers, that the depositions could be read subject to the right of an opposing claimant of the fund to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by the other claimant.

A. C. F. Boulton, for the defendant, Rosanna Gray.

Middleton, for the defendant, Allen.

Rose, J.] [Mar. 3.

GREENE *v.* WRIGHT.

Judgment—Motion under Rule 324—Material necessary.

In order to obtain under Rule 324 a speedy judgment before the time for appearance in an action has expired, a plaintiff must show that some injury or injustice is likely to happen or to be done to him if he is not awarded immediate relief.

And where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests, and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shown was that the defendant was in financial straits, and had refused to submit his affairs to investigation, or to make an assignment.

Held, that a motion under Rule 324 for judgment before appearance must be refused.

B. E. Bull, for plaintiffs.

No one for defendant.

DIVISION, COURT.

Div. Court, Ottawa.] [Dec. 10, 1887.

MASSON *v.* WICKSTEED.

Cheque of the President of an Incorporated Company—Personal liability.

This was an action brought to recover the value of a dishonoured cheque drawn by the defendant as President of the Coffee House Company, in his the plaintiff's favour, for wages due to him as manager.

The cheque read as follows :—

"Charge to account of Temperance Coffee House Company.

"Ottawa, 30th April, 1887.

"To the Bank of Montreal, Ottawa, pay to W. T. McCulloch, or order, the sum of Fifty Dollars.

"$50.00. "R. J. WICKSTEED,

"*Pres. O. T. C. H. Co.*"

LYON, Co. J., held that the defendant was personally liable for the cheque, although signed by him in his quality of President of Coffee House Company, because the corporate name of the Company was not included in the body of the cheque, or properly attached to it.

Law Students' Department.

IN compliance with numerous requests, we have decided to establish a Students' Department in the LAW JOURNAL, wherein information of interest to students will, from time to time, be given. In this number we publish some of the papers set at the examination before Hilary Term, 1888.

LAW SOCIETY EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

REAL PROPERTY.

1. What was the object of the Statute of *Quia Emptores?*

2. What is meant by a feoffment with livery of seisin?

3. Explain the nature of an estate tail, and state what words are necessary to create it.

4. What is a use?

5. What is meant by a term of years?

6. What length of time is given to a person interested within which to register a will?

7. What is the difference between a surrender and a release?

SMITH'S COMMON LAW.

1. Is a husband liable in any case for a tort committed by his wife during coverture? If so, in what cases?

2. What implied authority has a wife to bind her husband for the price of goods which she buys (*a*) when she lives with her husband, (*b*) when she does not live with him?

3. Define *recapture* or *reprisal*; and explain on what conditions it is lawful.

4. Is there any difference between the power of an executor and that of an administrator to contract and do other acts before issue of probate or letters of administration respectively? If so, what, and why?

5. Explain the difference between a *penalty* and *liquidated damages.*

6. Define *stoppage in transitu.* How and when may it be exercised, and how defeated?

7. Explain what is meant by *conclusive* and *inconclusive presumptions* of law; and give an example of each kind.

EQUITY.

1. What is meant by the maxim, "Equality is equity?" Illustrate.

2. Distinguish between an executed and an executory trust.

3. A, assigns a debt due him from B, to C. C does not in any way communicate with B. In the meantime A makes another assignment of the debt to D, who notifies B of the same, and the money is paid to him. Has C any remedy against B? Explain.

4. Distinguish between a resulting trust and a constructive trust.

5. A and B entered into a contest in which it appears to the Court that their equities are in all respects equal. What principle will the Court proceed on in determining who should succeed? What maxim would govern the case?

6. If time is not made originally the essence of the contract, how can it be made so?

7. What is a *post-obit* bond?

ANSON ON CONTRACTS—STATUTES.

1. How far must revocation of an offer be communicated in order to rescind such offer?

2. Distinguish between motive and consideration as supporting a promise.

3. B, a lunatic, purchases a farm from A; pays for it, and dies. His representatives seek to recover from A the purchase money, on the ground of B's lunacy. How far ought they to succeed?

4. A agrees with B to sell him a picture, claiming it to be a Rubens. B buys the picture. It is found to be a copy, and B then seeks to rescind the agreement. How far would A's statement that the picture was a Rubens affect the sale?

5. A agrees in writing with B for the sale of certain lands. At the same time they agree that as part of the consideration for the purchase, B shall clear the timber on a certain part of the land. This clause is not put into the agreement as executed. B refuses to clear the timber because the written agreement does not call upon him to do so. How far should he succeed?

6. A in good faith accepts a bill of exchange for B, who has not given authority to A to accept. A expects B to ratify, but B does not. What is A's liability?

7. A note is dated at Toronto. An endorser gives his address verbally as Highland Creek. He resides in Whitby. Where should the notice of protest be sent to be sufficient?

Miscellaneous.

IN our Comments on Current English Decisions in the number of February 15, an error inadvertently crept into the note on *East and West India Dock Co.* v. *Kirk*. On page 79 of that number, on the fourth line from the top of the page, for "time to make" read "leave to revoke."

FOND OF A JOKE.—A learned judge, who was very fond of a joke, was once called upon when presiding over an English court, to pronounce sentence upon a prisoner convicted of a capital offence. He did so in the following words: "I think we had better let the subject drop."

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for February 25th and March 3rd contain Darwin's Life and Letters, and Cabot's Life of Emerson, *Quarterly;* Personal Experiences of Bulgaria, and the Evolution of Humour, *National;* Home Rule in Norway. *Nineteenth Century;* A Jacobean Courtier. *Fortnightly;* Mary Stuart in Scotland, *Blackwood;* A Night in the Jungle, *Macmillan:* Some Wiccamical Reminiscences, and The Romance of History—Bayard, *Temple Bar:* Unser Fritz, *Time;* Thackeray's Brighton. *All the Year Round;* with "A Tumbler of Milk," "The Five Horseshoes," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

A SUBSCRIBER sends in the following, which he truly says is too good to remain buried in an obscure country paper. The advertisement states that the advertiser (whose name we regretfully suppress out of regard for his bashfulness) states that he

"Has some of the best farms in the township of Maryborough for sale on easy terms. He lends money for four of the best Loan Companies in Ontario, at 6 per cent. and upwards, for any term of years. Interest to be paid *how* and *when* to suit borrower. He lends Private Funds at 10 per cent. on first-class security. He draws Wills, Bonds, Leases and Mortgages of all kinds at the lowest living rates. He collects accounts and posts books promptly and correctly. He issues Marriage Licenses for $2.00 and no bonds required. He has a few copies of his "Random Rhymes" to sell at $1.00 each. He has also a few counties of his "Window Man" Patent Right still left, which he will sell cheap. It is the best window fastener extant. He writes Obituaries in Rhyme at $1.00 each, the friends of the deceased furnishing Items and Cash in advance.

He will make out bills of sale and act Auctioneer in any part of the counties of Wellington or Perth.

Those who have private funds to lend, farms to sell or rent, or Division Court cases requiring the attention of a Solicitor, will save money by calling on

A Commissioner in the High Court of Justice.

(Name and address.)

The Canada Law Journal.

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THE bringing of an action for breach of promise of marriage against the executors of a deceased promisor is a novel experiment in litigation, which was recently undertaken in England in the case of *Finlay* v. *Chirney*, 84 L. T. 296. We are not surprised to learn that it proved unsuccessful. The Court of Appeal, however, held that if special damage to the personal estate of the plaintiff arises from the breach of such a promise, then in respect of such special damage an action would lie. As the *Law Times* remarks, the decision of the Court of Appeal dispels a popular illusion of long standing that the maxim *Actio personalis* applies exclusively to actions *ex delicto*, and not to actions *ex contractu*.

WE hasten to lay our respectful admiration before the judges of the newly constituted Queen's Bench Divisional Court for the marked conciseness of their judgments as contained in the current number of the Ontario Reports. Surely of the most practical methods of lessening the burden which is thrown upon the shoulders of those lawyers who conscientiously endeavour to keep up with the current decisions, is that judges should make a point of condensing their judgments to the greatest possible extent. Many of the profession will feel grateful to the learned judges of the Queen's Bench Divisional Court for their having apparently studied conciseness in the recent judgments to which we allude. None will dispute that our present Chancellor is, to say the least, one of the ablest occupants of the bench at the present moment, and yet conciseness and shortness have always been among many of the distinguishing characteristics of his judgments. On the other hand, the prolixity and verbosity in which some of the other occupants of the Bench indulge may, we think, almost be called one of the banes of our profession.

DIVORCE—SEPARATION DE CORPS.

IT seems to be felt by many that the law on the subject of divorce is not exactly what it should be; that in Canada divorce is a luxury for the rich, not a legal remedy free to all; that justice, in this respect, will not even appear unless invoked with the "open sesame" of a well-filled purse. That may be, but the object of this paper is not to criticise the Dominion law or to suggest any improvements, but to call attention to the substitute that exists for divorce in one of the provinces of this legally dis-united country. We refer to the action *en séparation de corps* in the civil law of the Province of Quebec.

A judgment of this character does not give the consorts the right to marry again. Neither husband nor wife can contract a new marriage while both are

living. For those whose aim is to be freed from one marriage in order to contract another, there may be very little satisfaction in obtaining a judgment of this nature; but for a wife with a bad husband, or a husband with a bad wife, when real hardships exist, and when only a separation is desired, the remedy is satisfactory and complete. The conditions under which this action can be taken are:—

Firstly, and principally, adultery on the part of either of the consorts; as to the wife the offence has only to be proved, but on that of the husband it must also be shown that he keeps a concubine in the house, though the practice is not to insist on strict proof of the latter. If it be proved that the adultery of the husband was notorious, this is, generally speaking, sufficient.

Secondly, husband and wife may respectively demand separation on the ground of outrage, ill-usage, or grievous insult *(excis sévices et injures graves)*, committed by one toward the other. It is usually, as might well be imagined, the wife that urges this ground in an action against the husband, but there have not been wanting cases where a peaceful and law-abiding husband has had to take action against his better-half. In many cases this provision of the law is taken advantage of by wives who are subject to the ill-treatment of drunken husbands.

Thirdly, a wife may demand separation if her husband refuses to receive her and furnish her with necessaries of life. As will be seen, the causes are much the same as are usually urged to obtain a divorce in England or America.

Many French writers have laboured to prove the advantages of *séparation de corps* over divorce. It is called by one eminent writer, "*Une institution d'ordre public qui se propose le bon ordre des familles le bon ordre de la société.*" It is possible, however, that they may have thought more of the dictates of their Church —the Roman Catholic hierarchy, as is well known, having always condemned divorce—than of the requirements of the community.

In the Province of Quebec, if the plaintiff is poor, permission may be obtained to proceed *in forma pauperis*, so that in this way the poorest may there obtain a practical divorce. Indeed, it is a sort of poor man's law; he may get relieved from a life of misery, but is not allowed to marry again. Another advantage is that the consorts may, after being separated, re-unite at any time and without any formalities. This has been strongly urged in its favour, "*Si vous n'admettez que la séparation de corps, le nombre des familles désunies sera comparativement restreint, et la société aura l'espoir de voir ces familles se reconstituer, et la paix et la tranquillité se rétablir entre les époux.*" This argument may not, however, have as much force with us as with the more versatile countrymen of the writer.

The object of this paper is simply to bring out these following points, which may be useful in the consideration of this important subject: (1) That such a law exists in the Province of Quebec; (2) That it is practically a divorce law; (3) That it is within the reach of the poorest. It is worth considering whether it would not be well to adopt some such law in the other provinces of the Dominion.

FREDERIC HAGUE.

Montreal.

THE FISHERIES TREATY.

By Article I. of the Convention of 1818, there was accorded to the inhabitants of the United States forever the liberty to take fish of every kind in common with British subjects, upon certain portions of the coasts of Newfoundland and Labrador, and on the shores of the Magdalen Islands, and there was further accorded to them the liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of the said coasts; then followed that portion of the said Convention which has given rise to all of the contentions and disputes which have passed into history under the name of the Fisheries Question; this clause was in the following words: "And the United States hereby *renounce forever* any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or *within three marine miles of any of the coasts, bays, creeks or harbours* of His Britannic Majesty's dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such *bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water,* AND FOR NO OTHER PURPOSE WHATEVER. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Quite apart from the provisions of this Convention, the inhabitants of the United States always had, and now have, in common with all other people of the world, the right to take fish upon the high sea, but this right is one which is of little practical importance unless it is accompanied by the privilege of using the adjoining coasts and territorial waters, for purposes of shelter and as a base of operations and supplies. It is the undoubted right of every nation, accorded to it by international law, to deny the use of its shores and territorial waters to all foreigners, although such a denial is, in this age, looked upon as an unfriendly act, and one which is sure to provoke retaliation upon the part of foreign nations. It follows, therefore, that whenever foreigners are privileged to use our shores or territorial waters, that privilege is accorded to them either under the provisions of some treaty, or by virtue of international comity and commercial usage, based as well upon such comity as upon the reciprocal advantages which flow from free commerial intercourse.

In view of the recent fisheries negotiations, had at Washington, and the resulting inchoate Treaty, it may be worth our while to indicate some of the chief contentions made with respect to the construction and operation of the Convention of 1818, and to point out how they are affected by the proposed Treaty.

Every nation has territorial jurisdiction over the waters washing its shores to the extent of three miles from those shores. It has long been a controverted question whether this three mile limit should follow the sinuosities of the coast and run parallel thereto, or whether a straight line should be extended from headland to headland and the three miles measured seaward at right angles thereto. The framers of the Convention of 1818 put this question beyond the reach of honest controversy, in so far as the three mile limit mentioned therein was con-

cerned, for American fishermen were thereby excluded from all territory lying within three miles of the coast, or lying within three miles of any bays, creeks, or harbours. By Article III. of the Treaty now in question, it is provided that "The three marine miles mentioned in Article I. of the Convention of October 20, 1818, shall be measured seaward from low water mark, but at every bay, creek, or harbour, not otherwise specially provided for in this Treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbour, in the part nearest the entrance *at the first point where the width does not exceed ten marine miles.*" The operation of this Article is somewhat limited by the provisions of Article IV., which latter Article enumerates about a dozen bays and sets special lines of delimitation applicable thereto, the effect of which is to include within our exclusive territorial jurisdiction a number of bays having a width at their mouths varying from fourteen to twenty-two miles. In this connection must also be noticed the provisions of Article V., which are as follows: "Nothing in this Treaty shall be construed to include within the common waters any such interior portions of any bays, creeks, or harbours, as cannot be reached from the sea without passing within *the three marine miles mentioned in Article I. of the Convention of October 20, 1818.*" This latter Article (V.) is unhappily framed, and it is not improbable that it will give rise to fresh controversies. It appears to have been inserted at the instance of the British Commissioners, and we are unable to conceive why they thought it necessary or expedient to ask for it. It has been suggested that its effect by implication is to open as common waters all such interior portions of bays, creeks, and harbours, as are over six miles wide, provided that such interior portion can be reached without passing within three miles from the shore. We do not think that this contention can prevail, for upon turning to Article III. we find that "*such three marine miles* shall be measured seaward from a straight line drawn across the bay, creek, or harbour, in the part nearest the entrance, at the first point where the width does not exceed ten marine miles." This clearly closes the mouths of all bays having a width at their mouths not exceeding ten miles, and no foreign ship is entitled without our permission to pass through our territorial waters. So also with regard to the bays enumerated in Article IV. That Article does not purport to set any new limit to our territorial waters, but purports rather to define the three mile limit mentioned in the Convention of 1818; the mouths, therefore, of such bays are closed on the lines indicated in Article IV., and the line of delimitation closing the mouths as well of the bays referred to in Article III., as of those enumerated in Article IV., purports to be drawn upon the three mile limit mentioned in Article I. of the Convention of 1818. The only grant by implication which can be inferred from the wording of Article V. is that the American fishermen shall have in common with British subjects the right to take fish in such interior portions of any bays, creeks, or harbours, as can be reached from the sea without passing within the three marine miles mentioned in Article I. of the Convention of 1818, and as we have pointed out, it is by the delimitation of these three marine miles that the mouths of all of our bays and harbours are closed. The headland doctrine has

to a certain extent been recognized and preserved in the Treaty in question, and as to all of our bays, whether twenty miles wide at their mouth in the enumerated cases, or ten miles wide in all other cases, the line of delimitation, being the three marine miles mentioned in the Convention of 1818, as construed by the present Treaty, has been made to coincide with a line drawn three miles seaward and parallel with the mouth of the bay, and the present Treaty defines where the mouth of each bay is.

Every just or even plausible cause of complaint which the Americans may have had, or may have thought they had, by reason of the literal construction put by the British authorities upon the provisions of the Convention of 1818, in connection with the reporting, entering and clearing of American fishing vessels, and the payment of dues by them when they enter Canadian ports or harbours, in the exercise of the privileges reserved to them by the Convention of 1818, has been completely removed by the fair and liberal provisions of Article X. of the Treaty in question, which reads as follows:—

"United States fishing vessels entering the bays or harbours referred to in Article I. of the Treaty, shall conform to harbour regulations common to them and to fishing vessels of Canada or of Newfoundland. They need not report, enter or clear, when putting into such bays or harbours for shelter or repairing damages, nor when putting into the same, outside the limits of established ports of entry, for the purpose of purchasing wood or of obtaining water, except that any such vessel remaining more than twenty-four hours, exclusive of Sundays and legal holidays, within any such port, or communicating with the shore therein, may be required to report, enter or clear, and no vessel shall be excused thereby from giving due information to boarding officers.

They shall not be liable in any such bays or harbours for compulsory pilotage; nor when there for the purpose of shelter, of repairing damages, of purchasing wood, or of obtaining water, shall they be liable for harbour dues, tonnage dues, buoy dues, light dues or other similar dues, but this enumeration shall not permit other charges inconsistent with the enjoyment of the liberties reserved or secured by the Convention of October 20, 1818."

It was felt by the Americans to be a grievance that whenever their fishing vessels were driven into a Canadian bay for shelter, or for the purpose of repairing damages, they should be compelled to formally report to a Canadian official at the nearest port of entry, no matter how far distant it might be, and should have to formally enter and clear from that port; and they further complained that whenever they exercised their treaty privilege of purchasing wood or obtaining water, they had to make a similar report, entry and clearance, although the nearest custom house where that could be done might be very many miles from where the wood or water was obtained, and that in all of these cases the American vessels, while exercising their treaty privileges, were subjected to various claims for dues which were both onerous and vexatious.

It has been objected that this Article gives the American fishermen an unfair advantage over the Canadian fishermen, as Canadian fishing vessels are subject to some of the restrictions which have been removed in so far as American

vessels are concerned. The position of Canadian vessels in this respect has been thus stated by the Canadian Minister of Marine and Fisheries: "Canadian fishing vessels are required to report, enter or clear when they put into Canadian ports or harbours for shelter or repairing damages, provided they require to communicate with the shore, or remain over twenty-four hours. When they merely run in and remain in at anchor for a few hours they are not required to report. All fishing vessels are exempt from sick mariners' dues; they have, however, the option of paying them, and securing the benefits of the fund. Harbour-master's dues are exacted at ports proclaimed under the Act from all vessels entering and discharging, or taking in cargoes, ballast, stores, wood and water. These would not therefore be legally required from Canadian fishing vessels in for shelter and repairs, and in practice are seldom exacted from any Canadian vessel. In Halifax, harbour-masters' dues are not paid by any vessels under twenty tons, nor by coasting vessels, which include fishing vessels. At Pictou and Sydney, harbour dues are, by Act of Parliament, exacted from all vessels over forty tons register. Whether in practice fishing vessels are exempt when over forty tons cannot be stated without correspondence with the harbour-masters of those ports. All vessels under eighty tons are exempted from compulsory pilotage dues by the general Act. Pilotage authorities have, in addition, the power to make other exemptions with consent of the Governor-in-Council, and have generally exempted fishing vessels. No tonnage, lighter, or buoy dues are collected in Canada."

The answer to any objection of the sort indicated is, that the law should be so amended as to put Canadian vessels in just as favourable a position as American vessels in this respect.

Article XI. of the proposed Treaty is worded as follows:—

"United States fishing vessels entering the ports, bays, or harbours of the eastern and northeastern coasts of Canada, or of the coasts of Newfoundland, *under stress of weather or other casualty*, may unload, reload, tranship or sell, *subject to customs laws and regulations*, all fish on board, when such unloading, transhipment or sale, is *made necessary as incidental to the repairs*, and may replenish outfits, provisions and supplies, damaged or lost by disaster, and *in case of death or sickness* shall be allowed all needful facilities, including the shipping of crews.

Licenses to purchase, in established ports of Canada or of Newfoundland, *for the homeward voyage*, such provisions and supplies as are ordinarily sold to trading vessels, shall be granted to United States fishing vessels in such ports promptly upon application and without charge, and such vessels, *having obtained licenses in the manner aforesaid*, shall also be accorded upon all occasions such facilities for the purchase of casual or needful provisions or supplies as are ordinarily granted to trading vessels, but such provisions or supplies shall not be obtained by barter nor purchased for resale or traffic."

We have italicised those words which will serve to show the Canadian contention as to the construction of this Article, but it will require no prophet to forsee that we have here the basis for future contentions and alleged grievances,

beside which the contentions and grievances under the Convention of 1818 will pale into puny insignificance. We have not at our command the space which would be required to point out what a fertile ground for the production of controversies this Article is fitted to be, but we are much at fault in our estimate of the dishonesty and perverse ingenuity of American fishermen, and the politicians who head them, if in the event of the Treaty becoming operative, a luxuriant crop is not speedily produced therefrom, unless, indeed that Article be accepted as a passage through which we can gracefully retire, and yield to our high-minded and generous cousins all that they desire. Our legal position under the Convention of 1818 was sure and firm. Under it American fishermen were allowed to enter our territorial waters for certain clearly specified purposes, and for those purposes only; under it we could accord to them any hospitality or privileges which we might desire to do, and when that hospitality and those privileges were abused, we could withdraw them. We are now about to give them a ***permanent legal status*** within our territorial waters, differing, among other things by reason of its irrevocability, from the commercial privileges which by custom are afforded to all friendly nations, and which commercial privileges, in so far as they relate to fishing vessels were expressly renounced by the Americans, under the Convention of 1818. We have no doubt that the British Commissioners did the very best they could to secure to Canada her rights, and to prevent her from being overreached. They doubtless had in view this desirable end, that a settlement should be arrived at which would prevent the possibility of all future grievances and misunderstandings, and if we could feel that that end had been attained, we should be heartily glad to see the Treaty ratified, and the fisheries question thereby forever laid at rest; but we are unable to set aside the belief that by giving the American fishermen the new and firmer foothold which the Treaty accords to them, we shall thereby facilitate the perpetration of fresh frauds, and furnish them with far better material than they formerly had, upon which to exercise their ingenuity in basing extravagant demands, and thereby creating fresh controversies for the employment and advantage of their professional agitators.

The American fishermen have always found it exceedingly inconvenient to carry on their fishing operations without having the benefit of certain privileges which were not secured to them by the Convention of 1818. The chief of these privileges are the right to purchase provisions, bait, ice, seines, lines, and other supplies and outfits, the right to land the fish caught by them, and send the same home by rail, and the right to fill vacancies in their crews by procuring Canadian sailors and fishermen. The Canadian fishermen, on the other hand, have found that without having the benefit of the American market they are unable to dispose of their fish, as their catch is more than sufficient to supply all the other markets open to them; but the American market has been practically closed to them by the duty which the Americans imposed upon the produce of the Canadian fisheries.

Article XV. of the proposed Treaty provides for the making of such reciprocal concessions as will secure to the fishermen of each country that which they

most desire. It is worded as follows: "Whenever the United States shall remove the duty from fish, oil, whale oil, seal oil, and fish of all kinds (except fish preserved in oil), being the produce of fisheries carried on by the fishermen of Canada and Newfoundland, including Labrador, as well as from the usual and necessary casks, barrels, kegs, cans, and other usual and necessary coverings containing the products above mentioned, the like products being the produce of fisheries carried on by the fishermen of the United States, as well as the usual and necessary coverings of the same, as above described, shall be admitted free of duty into the Dominion of Canada and Newfoundland; and upon such removal of duties, and while the aforesaid articles are allowed to be brought into the United States by British subjects without duty being re-imposed thereon, the privilege of entering the ports, bays and harbours of the aforesaid coasts of Canada and Newfoundland shall be accorded to United States fishing vessels by licenses, free of charge, for the following purposes, namely:—

"'1. The purchase of provisions, bait, ice, seines, lines, and all other supplies and outfits.

"'2. Transhipment of catch for transport by any means of conveyance.

"'3. Shipping of crews.'

"Supplies shall not be obtained by barter, but bait may be so obtained. The like privileges shall be continued, or given to fishing vessels of Canada and of Newfoundland on the Atlantic coasts of the United States."

On the whole we think that the proposed Treaty would be a fair and satisfactory settlement, and, on the part of the Canadians, a generous settlement of the many difficulties surrounding the fisheries question, if the persons on whom that generosity is bestowed belonged to a class in which there could be reposed the slightest confidence that they would honestly endeavour to conform to the plain intent and meaning of the Treaty; but, taking into consideration all the surrounding facts, as they exist, we fear that the ratification of the Treaty will be followed by more trouble and complications than ever arose under the Convention of 1818.

A. H. M.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for March comprise 20 Q. B. D. pp. 297-442; 13 P. D. pp. 21-41; and 37 Chy. D. pp. 167-328.

CHATTEL MORTGAGE—PARTIAL INVALIDITY OF DEED.

In re Burdett, 20 Q. B. D. 310, is useful as showing that a chattel mortgage, though void as to some of the chattels thereby purported to be transferred, may nevertheless be good as to others. In this case a chattel mortgage, not in the statutory form, purported to assign "the several chattels and things specifically described" in a schedule thereto. The schedule comprised articles which were

personal chattels, and also a gas engine, which did not come within the definition of "personal chattels;" and it was held by the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) that though the deed was void as to the personal chattels for want of compliance with the Bills of Sale Act, 1882, it was nevertheless valid as to the gas engine. The Queen's Bench Divisional Court had considered that the case was governed by *Davis* v. *Rees*, 17 Q. B. D. 408, in which the Court of Appeal had held that when a bill of sale contained a covenant to pay, and an assignment of chattels personal, and of no other property, and was bad under the statute as an assignment, the covenant to pay was also avoided by the 9th section of the statute. But the Court of Appeal thought that case was distinguishable from the present, where other chattels were included.

ORDER DISMISSING ACTION FOR WANT OF PROSECUTION—"FINAL JUDGMENT."

In re Riddell, 20 Q. B. D. 318, although a bankruptcy case, is perhaps worth a brief notice. The question was whether an order dismissing an action with costs for want of prosecution was "a final judgment" within the meaning of the Bankruptcy Act, entitling the defendant to serve the plaintiff with a bankruptcy notice. Cave and Grantham, JJ., held it was not. Cave, J., said: "The order in question was made in a case which has not been fought, and in which there has been no adjudication whatever on the merits. No doubt the order is in the nature of a judgment, and cannot itself be re-opened, but it is no obstacle to a fresh claim by the respondent to the appellant's estates."

GARNISHEE—PAYMENT BY GARNISHEE UNDER VOID JUDGMENT.

The only point *In re Smith*, 20 Q. B. D. 321, necessary to be noticed is the fact that where, in pursuance of an order, a garnishee paid to a judgment creditor the debt which had been attached, and the judgment upon which the attaching order was issued, was afterwards declared void as against a trustee in bankruptcy by reason of the omission to file the order on which it was obtained, as required by a statute, the trustee in bankruptcy was held by the Court of Appeal entitled to recover the amount from the judgment creditor; but in the absence of fraud, the court held the payment by the garnishee was a good discharge to him, although the judgment on which the garnishee order was obtained was subsequently set aside, and this, notwithstanding the order for payment, gave the garnishee a period within which to make the payment, and he in fact made the payment before the time had elapsed.

PRACTICE—COSTS—TRIAL WITH JURY—CLAIM AND COUNTER-CLAIM.

In *Shrapnel* v. *Laing*, 20 Q. B. D. 334, the action was tried before a judge with a jury, and a verdict was entered by consent for £50 on the claim, and for the defendants for £80 on their counter-claim. Costs to be taxed according to the ordinary practice upon a trial by jury with such a result,—and the question was on this state of facts, to what costs each party was entitled. The Court of Appeal (Lord Esher, M.R., Fry and Lopes, LL.J.), affirming Pollock, B., held, that where an action is tried by a jury, and the defendant counter-claims in re-

spect of matters which could not be pleaded as set-off, and the plaintiff recovers on his claim, and the defendant on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim for the purposes of taxation of costs, should be treated as separate actions, and the costs in each taxed in favour of the successful party, subject to a deduction for costs of any issues in which he has not succeeded. And in such a case the court considered it immaterial on the question of taxation, whether the judgment is drawn up in form for the plaintiff for the sum recovered on his claim, and for the defendant for the sum recovered on the counter-claim, or, whether judgment is given for the defendant for the balance. In coming to this conclusion the court followed its decision in *Hewitt* v. *Bluner*, 3 Times L. R. 221, which Lord Esher stated was correctly reported.

HUSBAND AND WIFE—WIFE LIVING APART FROM HUSBAND—LIABILITY OF HUSBAND FOR NECESSARIES SUPPLIED TO WIFE—ADULTERY—CONNIVANCE BY HUSBAND.

In *Wilson* v. *Glossop*, 20 Q. B. D. 354, it is satisfactory to find that the Court of Appeal (Lord Esher, M.R., Fry and Lopes, LL.J.), have seen fit to affirm the judgment of the Queen's Bench Divisional Court, 19 Q. B. D. 379, noted *ante* vol. 23, p. 362. The action was brought for necessaries supplied to a wife who was living apart from her husband without means of support. The husband resisted the claim on the ground that his wife had committed adultery; but it being established that the husband had connived at the commission of the offence, it was held that it afforded no defence.

ARBITRATION—APPOINTMENT OF ARBITRATORS INVALID—AWARD—MAKING AWARD RULE OF COURT.

In re Gifford and Bury Town Council, 20 Q. B. D. 368, an application was made to a Divisional Court (A. L. Smith and Charles, JJ.) to make a submission to arbitration, and an award, a rule of court. The application was refused, because the arbitration was under an Act which required that the appointment of the arbitrators should be under the common seal of one of the parties, and under the hand of the other. The appointments so made were by the Act required to be delivered to the arbitrators, and then to be deemed a submission to arbitration by the parties making the same. One of the arbitrators, however, in this case, was appointed by one party under their common seal; but the other arbitrator was appointed by the other party, but not by writing under his hand. The arbitrators, so appointed, not being able to agree, appointed an umpire who made an award. The court held that the appointment of one of the arbitrators not being under the hand of the party appointing him, there was no valid submission to arbitration, that the appointment of the umpire, and the award, were consequently also invalid, and therefore neither the submission nor the award could be made a rule of court. In the course of their judgments the learned judges both draw attention to the difference of practice formerly prevailing at law and in equity on this subject; in the former it being the practice only to make a submission a rule of court, whereas in equity the practice was to make awards

orders of court: and they call attention to the remarks of Jessel, M.R., in *Jones* v. *Jones*, 14 Chy. D. 594-5, to the effect that the common law practice should be followed.

NEGLIGENCE—LIABILITY OF MASTER FOR INJURY CAUSED TO THIRD PERSONS—VOLENTI NON FIT INJURIA.

Thrussel v. *Handyside*, 20 Q. B. D. 359, was an action brought by a workman who was directed to work in a particular place, to recover damages against the employers of certain other workmen for injuries sustained owing to the latter workmen or their employers not having taken proper precautions. The plaintiff was employed as a carpenter to do work upon a building for his employers. Above him in the same building other workmen were employed by the defendants doing certain other work; this latter work was of a dangerous character, and injury was likely to result from pieces of iron falling on those below. The plaintiff was injured by a falling piece of iron. The jury found that the accident arose through the negligence of the defendants, in not taking proper precautions to protect those below—that there was no contributory negligence on the part of the plaintiff—and that the plaintiff did not voluntarily incur the risk. On a motion to set aside the verdict and enter a judgment for the defendant, Hawkins and Grantham, JJ., were of opinion that the verdict was correct, and dismissed the motion. The mere knowledge of the risk by the plaintiff, being held not to be a voluntary undertaking of the risk.

LANDLORD AND TENANT—"LEGAL NOTICE TO QUIT"—EJECTMENT.

Friend v. *Shaw*, 20 Q. B. D. 374, strikes us as being an exceedingly technical decision, and one that will hardly commend itself to common sense. The jurisdiction of a county court to entertain jurisdiction in ejectment between landlord and tenant was by statute confined to cases where the tenant's term and interest "shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit." The plaintiff let to the defendant a house for three years, at a monthly rent, subject to a provision for re-entry on non-payment of any part of the rent for twenty-one days. A month's rent having been in arrear for over twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term for non-payment of rent. Wills and Grantham, JJ., overruled the judgment of the county court judge, and held that "a legal notice to quit" must be taken to mean the notice to quit required by law, and not one depending on the express stipulation of the parties. "Legal" is defined by the dictionaries to mean "permitted or authorized by law." The notice in question was "permitted or authorized by the law," and yet in the judgment of the court it was not "legal," which seems a rather paradoxical result.

CANAL—RIGHT TO SUPPORT—STATUTORY REMEDY—COMPENSATION.

Lancashire and Yorkshire Railway Co. v. *Knowles*, 20 Q. B. D. 391, is an instructive case, showing that where a statutory right is given, and a statutory remedy is provided for those injuriously affected by the exercise of that right the statutory remedy must be strictly pursued, and that when another course is

taken, resulting in injury to the work authorized by the Act, the person taking that course becomes liable in damages to the party injured. By an Act power was given to a company to make a canal, and it was provided that nothing therein contained should affect the right of the owners of land to the mines or minerals under the site of the proposed canal, and it should be lawful for the owners to work such mines, not thereby injuring the canal; and further, that if the owner or worker of any mine, should, in pursuing such mining near or under the canal, in the opinion of the company endanger the same, then it should be lawful for the company to treat and agree with the owner or worker of the mine, and in case of disagreement a jury was to be summoned to assess the amount such owner or worker ought to receive, on being restrained from working such mine; and on payment of such amount the further working of the mine was to be perpetually restrained within the limits for which such satisfaction should, by the jury, be declared to extend. The defendants gave the company notice that they were going to work a coal mine under the canal, and the company declined to pay any compensation to the defendants for leaving the coal. The defendants then went on with their mining and damaged the canal, and it was held by the Court of Appeal (Lord Esher, M.R., Fry and Bowen, L.JJ.) affirming a Divisional Court of the Queen's Bench (Mathew and Cave, JJ.), that the coal owner or worker had a right under the Act to require that compensation should be assessed by a jury, but had no right to work the coal to the injury of the canal, and was liable to the company for the damage so caused.

Correspondence.

THE PROPOSED LAW FACULTY.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—"The unexpected always happens." An attentive reader of the proceedings of the Law Society would never imagine that there was any danger of the legal fraternity becoming too few to transact the business of the country, and that the wheels of the car of Justice were likely to go slowly from a dearth of practitioners ready and willing to roll the chariot along. Yet, such must be the case, for a joint committee of the Law Society and of the Senate of the University of Toronto, have devised a new and short road to the bar, and are anxious to lessen the difficulties in the way of would-be barristers and solicitors, so far as time and study are concerned.

The Benchers have kindly and wisely submitted to the County Law Associations, and the authorities of the Universities of the Province, this "Scheme for the establishment and maintenace of a Law Faculty." The learned joint committee call this a "proposal for the *advancement* of legal education," and yet

one of the main features of the scheme is to reduce the time of study required before one can enter the (once-learned) profession of the law from seven years, (as now demanded of those who desire a liberal education, and so go to a university first), or five years (as now required of those who only wish to know "the three R's." and law), to four years, or rather to two university years, and two years of grace, about thirty-six months in all.

We think the aim of all who have the welfare of the profession at heart should be to lengthen the time of study, and to increase the amount of knowledge required for admission into the ranks of practitioners; so vast is the field of legal knowledge, that a graduate trained to study can scarcely become acquainted with it in his three years' course, while the youth, fresh from the high school, who gives five years to it feels, when he looks at the "final" examination papers, how precious little he knows of the subjects.

Then, too, it is proposed "to swap horses" in crossing the narrow stream of four years; and half the time the student is to be fed by the *Alma mater* of Toronto, and half the time by the Law Society. We are told that infants fed upon milks from different cows are apt to have their digestive organs injured.

The scheme submitted is very meagre (the only thing perfectly clear is the "fees," these are touchingly alluded to in five of the eighteen paragraphs of the report). There is to be a "preliminary examination," under the authority of the University, but what the subjects are to be is not said. The University is to give instruction in jurisprudence, having regard to court law, constitutional law and history, and international law. Is it to teach these and nothing more to the aspirant for LL.B.? Or, are the classics, and the philosophies, and the ologies, so essential to a liberal education, to be also taught? How many doses a week of court law and international law is an infant student to take each week? Then, again, on what are the lectures of the Law Society to hold forth during the third and fourth years? Without information on these, and divers other points, how can any County Law Association pronounce definitely on the scheme proposed unless, indeed, the members can, Cuvier-like, construct the whole of an antediluvian monster whenever they are presented with a big toe.

We think, on general principles, that it is bad to try and lessen the numbers of those who are willing to take a course in arts before they study law, by holding out to them this easily won LL.B. We think, too, that the Law Society is old enough to stand alone, and rich enough to pay all professors and teachers it may need to instruct its youthful members; we deprecate the idea of its forming any alliance with any other teaching body, and we say that it should not lower its dignity by becoming the mere handmaid of Toronto University. If, however, the Benchers are getting old and weary of their duties, common justice demands that the same rights and privileges should be given to the other universities as are proposed to be bestowed upon Toronto University, and that the last clause of the report should be "The Law Society *shall*, upon similar terms, enter into this scheme with any University in Ontario that may desire it."

BARRISTER.

Proceedings of Law Societies.

THE LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1888.

THE following is a *resumé* of the proceedings of Convocation during Hilary Term, 1888:—

The following gentlemen were called to the Bar during the above Term, *viz.*:—

February 6th.—Francis Alexander Anglin, with honours and awarded a silver medal; Francis Patrick Henry, William Howard Hearst, William Edward Sheridan Knowles, John Hood, George Ira Cochran, Edward Corrigan Emery, James Adam McLean, William Lyon Mackenzie Lindsey, John Williams Bennet, Jeffrey Ellery Hansford, Albert Edward Trow, John Henry Alfred Beattie, Thomas Hislop, Albert Edward Dixon, George William Ross, Clarence Russell Fitch, Colin Judson Atkinson.

February 7th.—Nicholas Ferrar Davidson, Arthur Edward Watts.

February 11th.—Hugh Guthrie, Charles Edgar Weeks, George Smith.

February 17th.—George Nelson Weekes, Francis Ambridge Drake.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz.*:—

November 22nd, 1887.—G. L. Lennox.

February 6th, 1888.—N. F. Davidson, F. A. Anglin, J. A. McLean, J. M. Mussen, A. Grant, A. E. Trow, W. W. Jones, W. L. M. Lindsey, F. A. Drake, H. Guthrie, H. A. Percival, C. R. Fitch, C. J. Atkinson, A. E. Dixon.

February 7th.—J. Hood, E. J. B. Duncan, W. J. Millican.

February 11th.—F. P. Henry, J. Carson, E. C. Emery, W. H. Wallbridge.

February 17th.—A. E. Watts, G. N. Weekes.

The following gentlemen passed the Second Intermediate Examination, *viz.*:—

M. H. Ludwig, with honours and first scholarship; G. W. Littlejohn, with honours and second scholarship; W. S. McBrayne, with honours and third scholarship; and Messrs. S. H. Bradford and J. F. Gregory, with honours; E. O. Swartz, W. C. Mikel, E. E. A. Du Vernet, D. H. Chisholm, W. Pinkerton, H. B. Cronyn, O. Ritchie, E. P. McNeil, M. S. Mercer, F. B. Denton, A. E. Cole, F. Rohleder, G. D. Heyd, J. W. S. Corley, A. D. Scatcherd, A. E. Baker, A. S. Ellis, F. B. Geddes, D. A. Dunlap, C. D. Fripp, R. O. McCulloch, W. J. L. McKay.

The following gentlemen passed the First Intermediate Examination, *viz.*:—

A. W. Anglin, with honours and first scholarship; J. B. Holden, with honours and second scholarship; R. E. Gemmill, with honours and third scholarship; and Messrs. J. Agnew, A. J. Armstrong, W. L. E. Marsh, D. W. Baxter, D. R. McLean, C. E. Lyons, A. F. Wilson, G. A. Cameron, W. Carnew, H. Macdonald,

A. H. O'Brien, J. J. O'Meara, F. Harding, J. R. Layton, F. L. Webb, J. A. McIntosh, J. Porter, A. Crowe, F. W. Maclean, A. D. Crooks, A. Elliot, R. Barrie, W. H. Cawthra, W. Mackay, W. Yorke, J. F. Hare, D. Holmes, H. Jamieson, W. Kennedy.

The following candidates were admitted as Students-at-law, *viz.*:—

Graduates—M. Monaghan, E. G. Fitzgerald, C. J. Loewen.

Matriculants—W. D. Earngey, J. E. O'Connor, J. C. Quinn.

Juniors—J. Ballantyne, J. E. Varley, G. S. Morgan, J. R. Milne, D. B. Mulligan, L. Lafferty, A. J. Pepin, C. C. Fulford, P. F. Carscallen, W. H. Cairns.

Monday, 6th February.

Convocation met.

Present—Sir Adam Wilson, Kt., and Messrs. Ferguson, Foy, Hoskin, Irving, Kerr, Lash, Maclennan, McMichael, Morris, Murray and Osler.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read, approved and signed by the Chairman.

The Secretary read a letter from Mr. Audet, Registrar of the Court of Exchequer, requesting that Mr. Justice Burbidge be supplied with the Ontario Reports, Ontario Appeal, and Ontario Practice Reports, in the same manner as the Judges of the Supreme Court.

Ordered that the Reports be sent to Mr. Justice Burbidge.

Mr. Foy gave notice that he would to-morrow introduce a rule to amend rule 30, of section 12, by adding to the end of the first enumeration at the end thereof, the words, "and the Judge of the Court of Exchequer."

Mr. Moss, from the Committee on Legal Education, reported in the case of Thomas Browne, recommending that the filing in November last of the articles of February, 1883, be allowed *nunc pro tunc*, and in the case of R. M. Dennistoun, recommending that he be not allowed to take his solicitor examination in Easter Term next.

The report was adopted.

The letter of General Oliver, of the Military College at Kingston, was read, and the consideration of it deferred.

A letter from Professor Jones, of Trinity College, dated 3rd February, 1888, was read.

The Secretary was directed to acknowledge its receipt.

A letter from Mr. Elliot Traver was read, complaining that Mr. M. untruly held himself out to be a barrister.

The Secretary was directed to answer the letter, stating whether or not Mr. M. had been called to the Bar.

Letters from Mr. Walter Read, of the 23rd January, 1888, referring to unlicensed practitioners, were read.

Mr. Maclennan, from the Select Committee on Honours and Scholarships, presented their report, recommending that Mr. F. A. Anglin be called to the Bar with honours, and be awarded a silver medal; that Mr. A. W. Anglin be granted the First Scholarship of the First Intermediate Examination of one

hundred dollars; Mr. J. B. Holden, the Second Scholarship of sixty dollars, and Mr. R. E. Gemmill, the Third Scholarship of forty dollars; also, that Mr. M. H. Ludwig be granted the First Scholarship of the Second Intermediate Examination of one hundred dollars; Mr. G. W. Littlejohn, the Second Scholarship of sixty dollars, and Mr. W. S. McBrayne, the Third Scholarship of forty dollars; and that Mr. S. H. Bradford, and Mr. J. F. Gregory, be passed with honours.

The report was received, adopted, and it was ordered accordingly.

Mr. Kerr, from the Journals' Committee, reported that the seat of Mr. John Bell, Q.C., as a Bencher, is vacant.

Ordered, that the report be taken into consideration on Saturday next, and that the Secretary do give notice to Mr. Bell of the report, and of the time at which it is to be taken into consideration.

The Secretary reported that no other of the Members of Convocation has vacated his seat by absence.

Tuesday, 7th February.

Convocation met.

Present—Sir Adam Wilson, Kt., and Messrs. Blake (S. H.), Britton, Bruce, Ferguson, Foy, Guthrie, Hoskin, Irving, Kerr, Lash, Mackelcan, Maclennan, McCarthy, McMichael, Martin, Morris, Moss, Murray and Purdom.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The Secretary read the minutes of the last meeting of Convocation, which were approved.

Two letters from Mr. Walter Read, the Solicitor of the Society, were read upon the subject of the complaint of Mr. Miller against certain unlicensed practitioners, which was referred to him for report by order of Convocation of 27th December, 1887, and it appearing that it was a matter over which the Law Society has no control,

It is ordered that the Solicitor's letters be referred to the Committee on Discipline, with the view of determining whether it is desirable to apply to the Provincial Legislature on the subject.

The Secretary reported that the Parchment Roll of the Society, containing the names of the Students, Barristers, Benchers and Treasurers, was in process of completion.

Ordered, that Standing Orders 3 to 9, at page 62, of the new Consolidated Rules, be referred to the Committee on Journals and Printing, to report their opinion as to continuing the said Standing Orders in their present form, and as to what modification, if any, would be desirable.

Mr. Maclennan, from the Committee on Reporting, presented a report on the subject of the application of Mr. Vankoughnet, Reporter of the Queen's Bench, for leave of absence on account of illness.

The report was received, read, considered, adopted, and ordered accordingly.

Pursuant to notice given by Mr. Foy, it was moved, and—

Ordered, that section 12, paragraph 30, enumeration 1, be amended by adding at the end thereof "and the Judge of the Court of Exchequer."

By leave of Convocation it was then moved, and—

Ordered, that enumeration 4 of the same rule be amended by inserting the words, "and any retired Judge" after the word Judges.

The above amendments to 1 and 4 of rule 30, section 12, were then read a second and third time and passed; rule 8, section 1, being suspended by unanimous consent.

In pursuance of notice given by Mr. McCarthy, it was moved, and—

Ordered, that the resolution of Convocation passed on 1st September, 1884, relating to the portraits of Chief Justices, be rescinded.

Mr. G. F. Shepley was unanimously elected a Bencher, to fill the vacancy in Convocation caused by the resignation of Mr. Justice Falconbridge.

Ordered, that the portraits of the Chief Justices of the Queen's Bench and Common Pleas Divisions be painted and placed in Osgoode Hall, and that it be referred to a Committee consisting of Messrs. Blake, Bruce, Irving, McCarthy, and Maclennan, to report upon the artist to be selected as well as the size of the painting.

Mr. Martin presented the report from the County Libraries' Aid Committee, which was read.

Ordered, for immediate consideration and adopted.

Ordered, that Mr. Winchester be appointed Inspector of County Libraries for the current year, and that he be paid one hundred dollars upon the completion of his inspection and presentation of his report.

Ordered, that the sum of two hundred dollars be paid forthwith to the Norfolk Law Association in accordance with the recommendation in the report of the County Libraries' Aid Committee.

Mr. Maclennan gave notice that he would at the next meeting of Convocation move to amend rule 31, section 12, page 49, by inserting the words, "any Barrister at Law not in arrears in the payment of his Bar fees, and not entitled under rule 30," after the word "year" in the second line of the said rule 31.

Ordered, that the telegraph operator be granted two months' leave of absence on account of illness, and that an allowance of seventy-two dollars be made to defray necessary expenses, she undertaking to find a substitute during her absence from duty.

Saturday, 11th February.

Convocation met.

Present—Sir Alexander Campbell, K.C.M.G., and Messrs. Blake (S. H.), Ferguson, Foy, Irving, Kerr, Lash, McCarthy, Mackelcan, Maclennan, Morris, Moss, Murray, Robinson, Shepley, Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of the last meeting were read and approved.

Mr. Moss presented the Report of the Committee to establish a Teaching Faculty in Law, which was read and ordered to be printed, and a copy sent to each Member of Convocation; and the report was ordered to be taken into consideration at the next meeting of Convocation, on Friday, 17th instant.

Mr. Murray presented the Report of the Finance Committee, accompanied by the Balance Sheet for 1887 and the Estimates for 1888:—

ABSTRACT OF BALANCE SHEET FOR 1887.

RECEIPTS.

Certificate and Term Fees	$19231 90	
Less Fees returned	36 60	
		$19195 30
Notice Fees		642 00
Attorneys' Examination Fees	7939 60	
Less Fees returned	970 00	
		6969 60
Students' Admission Fees	7450 00	
Less Fees returned	470 00	
		6980 00
Call Fees	10923 25	
Less Fees returned	2105 25	
		8818 00
Interest and Dividends		3304 20
SUNDRIES:—		
Fees on Petitions, Diplomas, etc.		105 00
Fines—Lending Library account		4 80
		$46018 90

EXPENDITURE.

REPORTING:—		
Salaries	$8725 00	
Printing	8496 97	
Notes for Law Journal	266 44	
Digests	1165 00	
	18653 41	
Less Reports sold	997 02	
		$17656 39
EXAMINATIONS:—		
Salaries	3200 00	
Scholarships	1160 00	
Printing, Stationery and Medals	396 22	
Examiners for Matriculation	302 00	
		5058 22
LIBRARY:—		
Books, Binding, and Repairs		5659 09
County Libraries' Aid		2647 00
GENERAL EXPENSES:—		
Salaries—		
Secretary and Librarian	2000 00	
Assistants	1400 00	
Housekeeper	511 25	
		3911 25
Lighting, Heating, Water, and Insurance—		
Gas	208 52	
Water	106 54	
Insurance	90 00	
Ontario Government—Steam Heating	850 00	
Fuel	260 43	
Repairs to Apparatus	32 67	
		1548 16

Grounds—		
Gardener and Assistant	$350 00	
Tools	2 90	
Cartage	3 00	
Labour—P. O'Brien	360 00	
Snow Clearing	61 72	
		$777 62
SUNDRIES:—		
Postage	64 85	
Advertising	109 85	
Stationery, Printing, etc.	276 82	
Law Costs	92 40	
Furniture	442 18	
Repairs (including O'Connor, $459.56—Tenant, $321.95)	850 14	
Grant to Legislative Committee—Expenses attendant upon drafting a consolidation of the procedure and practice in accordance with the views of the Profession, for submission to the Judges	2000 00	
Reception to Governor-General	139 40	
Draper Estate, for Judges' Picture	300 00	
Term and Committee Lunches (Meetings, 77)	1179 09	
Telephone Office	554 32	
Auditor	100 00	
Hardy (Chart), $100; Clarkson (Soap), $15.60	115 60	
Ellis (Clocks), $12; Resumé, $42	54 00	
O'Connor, $46.48; Tenant, $110.51	156 99	
Telegrams, $14.55; Ice, $48.00	62 55	
Stenographers, $85.90; Plan of Grounds, $21.50	107 40	
W. A. Reeve, $50; Miss Shaw, $57.50	107 50	
Dusting Books, $22.35; Mat, $11.55	33 90	
Guarantee Co., $20; G. M. Adam, $10	30 00	
Inspector	100 00	
Secretary's Expenses to Buffalo, *re* Library	8 05	
Postman, $5; Petty charges, $56.98	61 98	
		6947 02
		$44204 75
Balance		1814 15
		$46018 90

Audited and found correct.

(Signed) HENRY WM. EDDIS, *Auditor.*

Toronto, 27th January, 1888.

Mr. S. H. Blake's letter on the subject of Mr. F. A. Drake's inability to attend an oral examination for call after passing his written examination, in consequence of illness, was read, upon which it was ordered that under the special circumstances the oral examination should be waived, and he be at liberty to present himself for call.

Mr. Kerr moved that the report of the Journals and Printing Committee be taken into consideration, pursuant to notice.

The Secretary reported that he had written to Mr. Bell, informing him that the Committee had reported that he had vacated his seat in Convocation by non-attendance for three consecutive terms, whereupon it was ordered that the Secretary do address Mr. Bell, and inform him that the Records show that he had not attended Convocation at any meeting held during the past three terms of Easter, Trinity, and Michaelmas, 1887; and that he be informed that Convocation will take the report of the Committee on Journals in his case into consideration, on Friday, 17th inst.; and further that the Secretary do ask Mr. Bell to specify the days of the Term on which he was present in Convocation on or since the first day of Easter Term, 1887.

Ordered, that Sir Adam Wilson, Kt., be placed on the Finance Committee in lieu of Mr. Justice Falconbridge, resigned; and that Mr. Shepley be placed on the Reporting Committee in place of Mr. Justice Falconbridge.

In pursuance of notice given by Mr. Maclennan, on the last day of Convocation,

Ordered, that rule 31, section 12, be amended by inserting the words, "any Barrister at Law not in arrears in the payment of his Bar fees and not entitled under rule 30" after the word "year," in the second line of the said rule 31; and a rule to that effect was read a first and second time, and by unanimous consent a third time, and was passed.

Ordered, that the four sets of the Law Reports Digest, from 1866 to 1880, be sold to any of the County Libraries which may apply for the same at ten dollars per set.

Ordered, in connection with the leave of absence recently granted to Mr. Vankoughnet, that an appropriation be made of $250 towards payment for the performance of his duty during his absence.

Friday, 17th February.

(Subject to confirmation at next meeting of Convocation.)

Convocation met.

Present—Messrs. Blake (S. H.), Bruce, Foy, Hoskin, Irving, Kerr, McCarthy, Mackelcan, McMichael, Martin, Meredith, Morris, Moss, Murray, Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Ordered, that the County Libraries be supplied with one copy of the Triennial Digests of the Ontario Law Reports, free of charge.

The Secretary read the letter addressed by him to Mr. John Bell, in accordance with the directions of Convocation, and Mr. Bell's letter in reply thereto.

Ordered, that the report of the Committee as to Mr. Bell's attendance be referred back with instructions to reconsider the said matter, and to hear any evidence that Mr. Bell may desire to offer to show that his seat has not been vacated.

Ordered, that the consideration of the report of the Committee on a scheme for the establishment and maintenance of a Law Faculty be deferred until 14th

April next, at 11 a.m., and that the Committee to which was referred the said subject be re-appointed, and that Messrs. James Maclennan, Q.C., and H. W. M. Murray, be added as members thereof; and that such Committee be requested to consider further the matters before referred to it, and that the Committee request the authorities of the Universities in the Province of Ontario to make suggestions in writing upon the questions submitted to the Committee, and upon the report already submitted to Convocation, and to request the presence of representatives of such bodies at its meetings, and to report to Convocation the said matters on or before the 24th March next, by transmitting the same to the Secretary of the Society; and to have printed and sent to each member of Convocation a copy of such report, with any further suggestions and memoranda it may think proper; and that special call of the Bench be had for 11 o'clock on the 14th April next, to consider such report; and it is further ordered, that the Secretary transmit to every County Law Association a copy of the report of the Joint Committee appointed by the Law Society of Upper Canada and the Senate of the University of Toronto, dated 5th February, 1888, and also a copy of the above resolution, and request that the same be brought to the notice of the members of the Association.

Mr. Martin, from the County Libraries' Aid Committee, presented the report of the Committee, which was received, read and adopted.

Ordered, that the following payments be made, namely:—

To the	Middlesex	Law	Association, . . .	$55 00
"	Hamilton	"	" . . .	90 00
"	Carleton	"	" . . .	660 00
"	Bruce	"	" . . .	50 00

Mr. McCarthy, from the Special Committee appointed respecting the painting of the portraits of the Chief Justices, presented the report of the Committee, which was received, amended, and adopted.

Ordered, that Mr. Berthon be engaged to paint the said pictures.

Ordered, that it be referred to the said Special Committee to carry out the directions of Convocation in regard thereto.

Mr. Maclennan, from the Committee on Reporting, reported as follows:—

The Committee on Reporting beg leave to report that the work of reporting in all the divisions of the High Court, and in the Court of Appeal, and also the reporting of practice cases, is well up, and there are virtually no arrears.

The editor has applied for the appropriation of a small sum to enable him to pay some expenses in connection with the procurement of materials for reporting election cases, and particularly to obtain copies of important parts of testimony taken at election trials by the shorthand reporters.

The editor thinks that the expenses may, perhaps, amount to fifty dollars, and your Committee recommend that an appropriation be made for that purpose, of a sum not exceeding one hundred dollars.

The report was adopted, and it was ordered accordingly.

J. K. KERR, *Chairman Committee on Journals.*

DIARY FOR APRIL.

1. Sun.....*Easter Sunday.*
2. Mon....Easter Monday. C.C. York sit. for motions begin
3. Tues...C.C. non-jury sittings, except York.
7. Sat. ....C.C. York sittings for motions end.
8. Sun.....*1st Sunday after Easter.*
14. Sat. ....Princess Beatrice born, 1857.
15. Sun.....*2nd Sunday after Easter.*
17. Tues....C.C. non-jury sittings in York.
22. Sun.....*3rd Sunday after Easter.*
23. Mon....St. George's day.
25. Wed....St. Mark.
29. Sun.....*4th Sunday after Easter.*

Reports.

COUNTY COURTS.

[Reported for the CANADA LAW JOURNAL.]

MCINTYRE *qui tam v.* HALL *et al.*

Action against Justices for non-return of conviction—Dominion and Provincial Acts—Statement of defence—Striking out—Order for penalty.

In an action against two Justices of the Peace to recover the penalty for failure to make return of a conviction.

Held, that the allegation in the statement of claim of the non-return, before the second Tuesday in December, of a conviction made by two Justices in October, showed that the action was brought under R. S. C. c. 178, s. 99, and not under R. S. O. c. 76 (1877), and the defendant had no reasonable ground to allege uncertainty in the claim.

Held, also, that to assert malice on the part of plaintiff in bringing the action was no defence, and that a petition for relief under 48 Vict. cap. 13, s. 16 (Ont.), could not be entertained, where the claim was under an Act of the Dominion Parliament. The statement of defence was therefore ordered to be struck out, and judgment entered for plaintiff with the costs of the motion.

[MACDONALD, Co. J., Brockville.

The defendants, as Justices of the Peace, had convicted one P. of assault, and imposed a fine with costs, on or about 10th October, 1887, but they failed to make a return of the conviction to the Clerk of the Peace, on or before the second Tuesday of December, 1887.

The writ of summons in this action was issued on the 18th January, 1888, to recover the penalty of $80 for failure to make a return of the conviction. The third paragraph of the statement of claim recited the facts of the conviction. The fourth paragraph set forth the failure to make a return. The second paragraph of the statement of defence set up that it was the duty of the Justices to make a return "forthwith," and that they had substantially complied with the provisions of the law in this behalf. The third paragraph asserted that the returns were made before this action was commenced, and that the plaintiff was actuated by malice.

Deacon, for the plaintiff, moved upon notice for an order striking out the defence set up in the second paragraph of the statement of defence, on the ground of its being an insufficient answer to the action and tending to prejudice, embarrass, and delay the fair trial of it; also for an order striking out the third paragraph, on the ground of its constituting no defence at all to the action; and upon said paragraphs being both struck out, for an order that the plaintiff be at liberty to sign final judgment in the cause upon the admissions of fact in the pleadings, for the amount claimed in the statement of claim and costs.

Wright, for French and Saunders, showed cause. He contended that the statement of claim is misleading and defective in not alleging whether it is under the Provincial or the Dominion statute that the action is brought, and in not stating under which statute it is brought. That the conviction before the Justices was made on the 10th of October, 1887; and the party convicted was ordered to pay fine and costs on the 10th November, 1887; that the return was filed on the 14th January, 1888, and the plaintiff did not issue his writ until 18th January, 1888; citing *O'Reilly qui tam* v. *Allen*, 11 U. C. B. R. 411, and urged that the court could and ought to stay proceedings in the cause, and applied for such to be done. That the defendants ought be relieved of the penality. He presented a petition asking for such relief, saying the same was put in under the provisions of the Ontario Act, 48 Vict. cap. 13, s. 16. He also cited *Dingway qui tam* v. *Avison*, 8 O. R. 357.

Deacon, for plaintiff, in reply cited *Atwood* v. *Rosser et al.*, 30 C. P. 628, and *Currie* v. *McCallister*, 16 C. L. J. 164.

MCDONALD, Co.J.—Both the Dominion and the Provincial Legislatures have made enactments in reference to the return of convictions by Justices of the Peace. In chapter 178 of the Revised Statutes of Canada and in and by the 99th section, it is enacted that "every Justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December, in each year,

make to the Clerk of the Peace or other proper officer of the court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants, which return shall include all convictions and other matters not included in some previous return, and that shall be in the form (V.) in the schedule to this Act. 2. If two or more Justices are present and join in the conviction, they shall make a joint return. And in and by the Revised Statutes of Ontario, 1877, chapter 76, provision was made that

"Every Justice of the Peace before whom any trial or hearing is had under any law giving jurisdiction in the premises, and who convicts and imposes any fine, forfeiture, penalty, or damages, shall make a return thereof and of the receipt and application by him of the money received from the person convicted, in writing, under the hand of such Justice, quarterly, on or before the second Tuesday in each of the months of March, June, September, and December in each year, to the Clerk of the Peace (and in the case of any convictions before two or more Justices, such Justices being present and joining therein, shall make an immediate return thereof), in the following form." (Here follows the form of return.)

It will be observed that the Ontario Act requires in the case of a conviction before two or more Justices that such Justices being present and joining therein shall make an immediate return thereof, while the Dominion Act does not make any distinction as between a conviction made by one, or two, or more Justices. Inasmuch as the plaintiff in the statement of claim alleges that the conviction (for the non-return of which he claims to recover a penalty from the defendants) was for an assault, and by virtue of Dominion legislation a Justice or Justices of the Peace are clothed with a summary jurisdiction in cases of assault, and inasmuch as he sues because the return was not made on or before the second Tuesday in December, 1887 (and not because it was not made immediately), I think it manifestly appears that he is suing under the Dominion Act, and that the defendants had not any reasonable cause to suppose otherwise. To such an action the statement of defence is not any answer whatever.

But if the action had been brought under the Provincial Statute, I do not think the answer of the defendants is good in law. In the second paragraph, they say it became their duty to make a return of the conviction "forthwith" (the Act says "an immediate return"), and that they complied substantially with the provisions of the law in that behalf. Clearly they should have stated that they had complied with such provisions, and it then would have been a matter for determination by the proper authority whether what they did was or was not a substantial compliance. Nor can I see that the fact of the return having been made before the action was commenced is any bar or answer to it, while the allegation that in commencing the proceedings the plaintiff was actuated by malicious motives is not a defence or answer to an action under either statute. (As a matter of fact it is not unreasonable to suppose that many *qui tam* actions are brought by parties influenced by just such motives.) Possibly, this allegation was inserted with a view of paving the way for the application which the defendants now make under 48 Vict. c. 13, s. 16, for relief from the penalty, but inasmuch as the present action is brought under the provisions of the Dominion Act, such application cannot be entertained.

The second and third paragraphs of the statement of defence must be struck out, and the plaintiff be permttted to sign judgment for the amount of the penalty as claimed, and the defendants must pay the costs of this application.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

FITZGERALD *v.* LANKIN.

Canada Temperance Act—Notice of Defence under Statute.

Where liquor was sold to the defendant in a Scott Act County to be resold there, notice to the plaintiff of the defence under the statute *held* to be necessary.

[ELLIOTT, Co. J., London.

The facts of the case appear in the judgment of

ELLIOTT, Co. J.—This is an action to recover the price of spirituous liquors sold to the defendant, who is an innkeeper in the county of Huron. The Canada Temperance Act,

popularly called the Scott Act, is in force in that county, and the defence set up is that the defendant intended to re-sell the liquor in that county, which was known to the plaintiffs, and that consequently the price cannot be recovered. The plantiffs object to the defendants setting up this defence under the statute, as he has not given notice of his intention to do so. The question, therefore, which I have to consider is, whether this notice is requisite.

By section 92 of the Division Courts Act it is enacted as follows: "In case the defendant desires to avail himself of the law of set-off, or of the Statute of Limitations, or of any other statute having force of law in Ontario, he shall, at least six days before the trial or hearing, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode, if within the division, or if living without the division, he shall deliver the same to the Clerk of the Division Court."

For the defendant it is argued that no notice is necessary, because this Temperace Act inflicts penalties for the infraction of its provisions, saying nothing about rendering the contract of sale invalid, that being a consequence superadded by the common law.

According to this argument this clause of the Division Courts Act only applies to the Statute of Limitations, the Statute of Frauds, or any other statute which bars the remedy, unless writing or some other preliminary proceeding is requisite, bearing directly upon the contract. This appears to me to be a narrow and restricted view of the words "or of any defence under any other statute having force of law in Ontario," and I am not able to bring myself to the conclusion that this contention is correct. It is said, suppose A sells goods to B, which A has received knowing them to have been stolen, must A in seeking to invalidate the sale give notice of the statute attaching criminal consequences to the knowing receiver of stolen goods? I answer, not necessarily. Because, independently of that statute, the sale is rendered invalid by the common law, because the transaction is against the public welfare.

Again, it is said, when the consideration of the contract is bribery at an election, or of goods procured by a smuggling transaction in fraud of the revenue, is a defendant obliged to give notice of the statute relating to bribery or of that inflicting penalties for smuggling in order to set up a defence in the Division Court? I answer in the negative. Because outside the statutes, in either case, a contract under such circumstances is vitiated by the Common Law as being against the public welfare. In all these, and similar instances, it is not necessary that in the Division Court notice of any statute should be given, because if no statute was in existence, such transactions would be invalid. But it is different with respect to the Canada Temperance Act. The sale of this liquor would be perfectly valid if it were not for that Act. Take it away, and nothing is left for the defendant on which to rest his defence.

The Division Courts Act allows defences of fraud, and various other defences to be set up without notice; and in this respect often puts the plaintiff to a disadvantage. Where there is a requirement of notice I think we ought not to lean to the restrictive side, if the cause of action is good and maintainable, but for a particular statute, I think notice of that statute should be given for the defence.

The operation of the Temperance Act is not universal in Ontario. It is confined to particular municipalities, and thus the question of locality is involved, and this circumstance adds to the desirability that the intention to set it up should be made known to the plaintiff.

The conclusion I arrive at is, that in the absence of notice, this defence is not admissible, and the judgment will be for the plaintiffs.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

CAUCHON *v.* LANGELIER.

Controverted Elections Act, c. 9, s. 50, R.S.C. —Judgment dismissing petition for want of prosecution non-appealable—Judgment refusing to set aside petition for want of prosecution non-appealable.

On the 23rd of April, 1887, an election petition was duly presented to set aside the election of the respondent as a member of the House of Commons for the Electoral District of Montmorency. The trial of the petition was fixed by order of a judge for the 22nd of

October, but was not proceeded with. On the 16th December application was made by respondent to the court to have the petition declared abandoned on the ground that six months had elapsed after the petition had been presented without the trial having been commenced, as provided in s. 32, c. 9, R. S. C. This application was granted by the court, and the election petition was dismissed. On appeal to the Supreme Court of Canada it was held (FOURNIER and HENRY, JJ., dissenting), that there was no provision in the Dominion Controverted Elections Act authorizing an appeal from such an order or judgment (R. S. C. c. 9, s. 50), and therefore the present appeal should be quashed, with costs, for want of jurisdiction.

Appeal quashed with costs.

Ferguson, for appellant.

McIntyre, for respondent.

In the L'Assomption Election Appeal, where the judgment appealed from was the decision of the judge refusing to set aside the election petition, on the ground that the trial had not been proceeded with within six months since the date of its presentation, and there was a subsequent judgment of the court setting aside the election on the admitted acts of corruption by agents, it was also held that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Prefontaine, for appellant.

Bisaillon, for respondent.

In the L'Islet Election Appeal, the appeal was quashed for the same reason as that given in the Montmorency case.

BENDER *v.* CARRIERE *et al.*

Executory contract—Non-fulfilment of—Action for price—Temporary exception—Incidental demand—Damages—Cross appeal.

In March, 1883, B contracted with C *et al.* for the delivery of an engine, in accordance with the Herreshoff system, to be placed in the yacht "Ninie," then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August C *et al.* took out a *saisie conservatoire* of the yacht "Ninie," and claimed $2,199.37 for the work and materials furnished. B petitioned to annul the attachment, and pleaded that the amount was not yet due, as C *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favor of B, both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract, and report on the defects. A report was made by which it was declared that the contract of C *et al.* was not carried out, and that work and materials of the value of $225 were still necessary to complete the contract.

On motion to homologate the expert's report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that Court held that as C *et al.* had not built an engine as covenanted by them, B's plea should be maintained, but as to the incidental demand, the Court held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench, that Court, taking into consideration the fact that the yacht "Ninie" had since the institution of the action been sold in another suit, at the instance of one of B's creditors, and purchased by C *et al.*, the proceeds being deposited in Court to be distributed amongst B's creditors, credited B with $225 necessary to complete the engine, allowed $750 damages on B's incidental demand, and gave judgment in favour of C *et al.* for the balance, viz., $1215.00 with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada, and cross-appeal as to the amount allowed on incidental demand by the Court of Queen's Bench, it was

Held, reversing the judgment of the Court of Queen's Bench (SIR W. J. RITCHIE, C.J., and TASCHEREAU, J., dissenting), that as it was shown that at the time of the institution of C's action it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C *et al.* covenanted to build it, their action was premature.

ors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. Appeal allowed with costs.

Gregory, for the appellant.

Weldon, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [Mar. 9.

STALKER *v.* TOWNSHIP OF DUNWICH.

Municipal Corporation—Pathmaster—Public duty—Private interest—R. S. O. (1877) *c.* 73, *s.* 1.—*Liability—Acquiescence by corporation—Compensation under Municipal Act—Assessment of Damages.*

A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O. (1877) c. 73, s. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where, professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual.

And where a pathmaster of a township, in the course of his employment, so acted as to disentitle himself to the protection of the statute, and thereby causes damage to the plaintiff,

Held, that the township corporation, as well as the pathmaster was liable; and even if not originally so, the corporation made itself liable by sanctioning what was done, and refusing to amend it after notice.

Damage to land, arising from an overflow of water, caused by negligently diverting the water from its natural course without providing sufficient outlet, is not the subject of compensation under the Municipal Act, 1883.

Since the O. J. Act damages should be assessed up to the date of judgment.

W. R. Meredith, Q.C., for the plaintiff.

Lash, Q.C., and *Glenn*, for the defendants.

Full Court.] [Mar. 9.

REGINA v. BUSH.

Constitutional law—Appointment of magistrates by Lieutenant-Governor of Province—Powers of Provincial Legislature—B. N. A. Act, ss. 91, 92, 48 *Vict. c.* 17 (*O.*).

The Crown has the prerogative right to appoint justices of the peace within the Dominion of Canada and each of its Provinces, but it derogated from that right by assenting to the B. N. A. Act, which conferred upon either the Parliament of Canada or the Legislatures of the Provinces the power to pass laws providing for the appointment of justices of the peace. Such laws are in relation to the administration of justice, and upon the proper construction of ss. 91 and 92 of the B. N. A. Act, are exclusively within the power of the Provincial Legislatures, under s. 91, para. 14. Additional weight is given to the construction placed upon these sections by the Parliament of Canada having from time to time, since the B. N. A. Act, passed laws recognizing the right assumed by the Provincial Legislatures to pass such laws and the appointments made under them.

An order *nisi* to quash a conviction made by a police magistrate appointed by the Lieutenant-Governor of Ontario, under 48 Vict. c. 17 (O.), on the ground that such statute is *ultra vires*, was therefore discharged with costs.

A. H. Marsh, for the defendant.

Irving, Q.C., and *Moss*, Q.C., for the Attorney-General of Ontario.

Delamere, for the magistrate.

Chancery Division.

Boyd, C.] [Mar. 1.

IN THE MATTER OF THE UNION RANCH COMPANY.

This was a petition by certain shareholders of the above Company, praying a winding-up order under R. S. C. c. 129.

Held, that R. S. C. c. 129, like the Insolvent Act of 1875, which provided for the winding-up of incorporated companies, is intended to be put into operation at the instance of creditors only.

Dr. Snelling, for the petitioners.

Bain, Q.C., and *McGregor*, for the Company.

Boyd, C.] [Dec. 16, 1887.

Re THE CENTRAL BANK OF CANADA.

Winding-up Act, R. S. C. c. 129—Shareholders' and creditors' nominees for liquidators — Interested liquidators — Parties mostly concerned in realizing assets—Liquidators' compensation.

Under ss. 98 and 99 of the Winding-up Act, R. S. C. c. 129, meetings of shareholders and creditors respectively were held. The shareholders' meeting recommended the appointment of C., G. and S. as liquidators. The creditors' meeting recommended C., G. and H. On the application to the court for the appointment of three liquidators, it was not denied that it would be necessary to resort to the double liability of shareholders to satisfy the claims of creditors under R. S. C. c. 120, s. 70.

Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, would be adopted by the court, and their nominees, C., G. and H., should be appointed.

As between H. and S. preference should be given to the former, because he was neither a creditor nor a shareholder, while S. was both, and so at a disadvantage, the general rule being that it is desirable that liquidators should be disinterested persons.

Sec. 28 of the Winding-up Act intends that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and if more than one, is distributed amongst them.

Bain, Q.C., for the petitioning creditor.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the bank.

Practice.

Rose, J.] [Feb. 24.

HARDY *v.* PICKARD.

Costs—Omission to order at Trial—Subsequent order—Rule 338.

The trial Judge reserved a judgment, and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs.

Held, that the case came within Rule 338, and that the Judge had power, even after an appeal to a Divisional Court which left his judgment undisturbed, to make an order as to costs.

Fritz v. *Hobson*, 14 Chy. D. 542, followed.

R. A. Dickson, for the plaintiff.

W. M. Douglas, for the defendant.

Chy. Divisional Court.] [Feb. 27.

In re SMART, INFANTS.

Infants—Custody—Habeas corpus—Petition.

The order of FERGUSON, J., 12 P. R. 312, was affirmed with one variation, viz., the *habeas corpus* is to run concurrently with the petition directed to be filed, and to be disposed of with it.

J. Maclennan, Q.C., and *H. J. Scott*, Q.C., for David Smart.

S. H. Blake, Q.C., and *H. Cassels*, for Emily A. Smart.

Q. B. Divisional Court.] [Mar. 9.

BANK OF HAMILTON *v.* BAINE.

Absconding debtor — Successive applications for writ of attachment—Fact of prior application not disclosed—Cause of action—Particularity in stating.

An application was made to a County Judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the judge did not finally determine against the application, but gave leave to renew it upon a further affidavit.

Held, that there was no reason why the application should not afterwards be made to another judge.

Semble, also, that where a judge refuses to grant an attachment, or an order to hold to bail, successive applications may be made to successive judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same, or different material, the judge should always be informed of every previous application; this, however, is more a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order, if the material warranted the granting of it.

Held, also, that the same particularity in stating the cause of action is not required when a judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a judge was required, nor as when personal liberty is involved.

McCarthy, Q.C., for the plaintiffs.

Aylesworth, for the defendant.

Court of Appeal.] [Mar. 8.

TEMPERANCE COLONIZATION SOCIETY *v.* EVANS *et al.*

Jury notice—Money demand—Equitable cause of action—Severing issues—Rule 256, *O.J.A.—Trial Judge—C. L. P. Act, s.* 255.

The order of the Chancery Divison, 12 P.P. 48, restoring the defendants' jury notice, which had been struck out, affirmed by this Court.

A. H. Marsh, for the appellants.

Hoyles, and *A. D. Cameron*, for the respondent.

Miscellaneous.

THE LAWYER AND HIS GARDEN.—Our old friend, James Vick, seedsman, of Rochester, N. Y., sends as usual his interesting catalogue for 1888. No recreation is better for a professional man than working in his garden, if he can afford to have one. At least so Chief Justice Draper thought, and he was as good a florist as he was a jurist. Whether he bought his seeds from James Vick we cannot say; but we do, and highly recommend them.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM

For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition: Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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THE Consolidated Rules will not come into effect until the 1st of September next. This will give the profession ample time to become familiar with the changes which they make. The Rules have been published, and are now in the hands of the booksellers.

A MEASURE has been introduced into the House of Commons, which, if it becomes law, and is properly enforced, must have a most salutary effect on the public morals. We mean the bill introduced by Hon. Mr. Abbott, intituled "An Act respecting Gaming in Stocks and Merchandise." The preamble recites the immoral tendencies of gaming and wagering on the rise and fall in the value of stocks, etc., the increase of bucket shops, and the expediency of prohibiting these evils. The first section of the bill forbids contracts for the purchase or sale of stocks, goods, merchandise, etc., where there is no *bona fide* intention of acquiring the stock, goods, etc., or selling them as the case may be, and also declares the making of any such contract, in respect of which there is no actual delivery of the thing sold or purchased, to be a misdemeanour punishable by fine and imprisonment. The habitual frequenters of bucket shops are also to be held guilty of a misdemeanour. The burden of proof as to his intention to actually acquire or sell the shares, goods, etc., is thrown on the maker of the contract, as soon as its existence is established. All connected in any way with bucket shops are to be made liable to all the penalties of the Act respecting Gaming Houses. We can see no objection to gambling at poker or dice which does not apply with equal force to the "speculations" at which this Bill is aimed. We hope to see it enacted in its entirety, and enforced with vigour and diligence.

THE Supreme Court of the United States has suffered a heavy, almost an irreparable, loss in the sudden death of Chief Justice Waite. That court occupies an anomalous position amongst national tribunals, since its duty is not merely to decide the questions involved in private litigation, but also to maintain the proper balance between the State and Federal Governments, and between the legislative and executive departments of the latter. It is the supreme arbiter, controlling and regulating all other authorities within the limits of the law and the Constitution; hence, the great importance of having for its judges men distinguished for talent, learning, moderation and conscientiousness. On them may depend the stability and permanence of the nation itself. The judges who have occupied a place in this court, have been men worthy of the

trust reposed in them, and none, perhaps, more so than the late Chief Justice. He had that practical wisdom, in a large degree, which enabled him to measure justice rather than compare precedents. He was courteous, patient, candid, of the true judicial temperament; his dignity was that of simple modesty. In the words of an American contemporary, "he was the latest chief of a long line of public servants, who, for a century, have with singular purity, probity, and ability, administered the judicial branch of the Federal Government, and it is but bare justice to say that his character, public and private, will compare favourably with the best and ablest of that noble line."

WE wonder whether R. S. O., 1887, contains many such unexplained, and for all that appears unauthorized variations in the Acts consolidated as the following, which we have accidentally come across in the course of practice. The Dower Act of 1879, 42 Vict. c. 22, s. 5, provided as follows:—"In case of a suit for partition or administration or *any suit in which a partition or sale of land is ordered*, and in which the estate of any tenant in dower or tenant by the courtesy or for life is established, if the person entitled to such estate has been made a party to the proceedings, the court or judge shall determine whether such estate ought to be exempted from the sale or whether the same should be sold;" and then the section goes on to provide that the land may be sold and the estate and interest of such tenants in dower, etc., shall pass thereby, and a sum in gross out of the purchase money may be directed to be paid to the person entitled to dower, etc. Being about to proceed on the faith of this section in the case of an action on a mortgage on lands in which there was an outstanding estate in dower, proposing to ask for a sale and the setting apart of a sum in gross to provide for the dower, we took the precaution first to see how the section was consolidated. We find the only place where this portion of the section is consolidated is in R. S. O., 1887, c. 104, s. 49, being the Partition Act, and it thus appears: "In case of an action or proceeding for partition or administration in which a partition or sale of land is ordered and in which the estate of any tenant in dower or tenant by the courtesy or for life is established," etc., and then continues as in 42 Vict. c. 22. Nothing appears to show why the words in the original statute, "or any suit in which a partition or sale of land is ordered," were left out. Can it be that this was the work of some officious individual who hastily eliminated these words as surplusage, without thinking the matter out or foreseeing that he was taking away a substantial part of the enactment?

WE have seen an advance advertisement of a work to be published shortly on "The Lives of our Judges," by D. B. Read, Q.C. This work will, no doubt, commend itself to the Bar generally. Mr. Read's long connection with the Bar, and as a Bencher of the Law Society for twenty-nine years, well fits him for being the author of such a work. The prospectus which has been sent to the members of the Bar in a short form, delineates the scope of the work. There is

so much history connected with the judges having relation to events well nigh forgotten, that a writer who undertakes to unearth these events, will receive the thanks not only of the Bar, but of the general public. The prospectus states that "The writer has not confined himself to the judicial lives of the judges, but has given their political career whenever they have been engaged in politics, their military career when engaged in defence of their country, and generally their lives as citizens and judges."

Several of the older judges distinguished themselves in the war of 1812. The battles of Lundy's Lane, Queenston Heights, Fort Erie, and Chrysler's Farm, were so important in their results, that those engaged in them will never be forgotten by the people of Canada. "The Lives of the Judges," when published, will, no doubt, contain reference to these events, and the part taken by the Canadian judges who contributed their share in defence of the country.

It may be taken for granted that, under the pen of Mr. Read, the political career of the judges will be treated in an independent and impartial spirit.

Many of the profession, who have anecdotes and incidents of interest connected with the subject will, doubtless, avail themselves of this opportunity of making them public, and recorded for future reference.

A PROBLEM IN THE ENGLISH LAW OF ARBITRATION.

THE English law of arbitration is eminently ripe for legislative reform. Its irregular development, its endless intricacies, its seeming contradictions, almost justify the historic anathema pronounced by Hallam upon the whole system to which it belongs.

My object in this paper is a limited one. It is to offer an answer to the question, Under what circumstances can a voluntary—as distinguished from a judicial or compulsory—reference to arbitration be revoked at the instance, and by the will, of either party?

It is thought that the following propositions not inaccurately describe the present state of English law upon this subject:—

PROPOSITION I.—A submission to arbitration is said to be "particular" when the arbitrators are, and "general" when the arbitrators are not, named in the agreement to refer.

Authorities: (1) *Die Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*, L. R. 20 Q. B. D., at pp. 180, 181, 1887: "Here the agreement to refer is certainly general in one sense, but it is not general with respect to the appointment of arbitrators" (per Justice Stephen). "In one sense, no doubt, there is a general agreement to refer all disputes or matters in difference, but in another sense the agreement is not general, because it is an agreement to refer to two named persons" (per Justice Charles). (2) *Piercy* v. *Young*, 14 Chy. D. 200, 1879, cf. Jessel, Master of the Rolls, at p. 203: "We are all clearly of opinion that a general agreement to refer matters in dispute to arbitration cannot be revoked."

His lordship then uses language which shows clearly what such "a general agreement" is not: "The authorities cited have no application. They all relate to cases in which the reference had been actually made to a particular arbitrator."

PROPOSITION II.—A particular submission is revocable when it does not, and irrevocable except by leave of the court when it does, contain a consent that the agreement to refer may be made a rule of court.

Authorities: (1) "Revocable when it does not," etc. *Re Rouse and Meier*, L. R. 6 C. P. 212; *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310; *Thomson* v. *Anderson*, L. R. 9 Eq. 523. (2) "Irrevocable, except by leave of the court," etc. Statute 3 and 4 William IV. c. 42, s. 39.

PROPOSITION III.—A general submission, as above defined, is irrevocable, and may be made a rule of court and enforced as such on the application of either party thereto, unless the agreement to refer contains words purporting a contrary intention.

Authorities: (1) "A general submission is irrevocable." *Piercy* v. *Young*, 14 Chy. D. 200. (2) "And may be made," etc. Com. Law Proc. Act, 1854, s. 17. (3) "Unless the agreement," etc., *e.g.*, that the decision of the umpire shall be final and without appeal. Cf. *Wadsworth* v. *Smith*, L. R. 6 Q. B. 332.

PROPOSITION IV.—A general submission to arbitration made under seal between two companies within the meaning of the Companies Acts, or between a company and an individual, is irrevocable except by consent of both parties, and may be enforced *(semble)* without being made a rule of court.

Authority: Companies Act, 1862, ss. 72, 73, and Railway Company Arbitration Act, 1859.

The benefit of these provisions might perhaps be taken by insurance companies whose policies are issued under seal, but if the arbitration clause is merely one of "the conditions of assurance," it must be stated (*Stoneham* v. *The Ocean, etc., Co.'y*, 19 Q. B. D.), or clearly implied (*Viney* v. *Bignold*, 20 Q. B. D.) to be a condition precedent.

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RAILWAY COMMISSION.

WE have just had the pleasure of perusing the report of the Royal Railway Commission laid before Parliament a short time ago, and as we believe the railway question to be one of the most important questions before the public at present, as it certainly is the most complex, we take the liberty of giving our views shortly on the recommendations of the Commission.

The Commission seem to have dealt very thoroughly and carefully with all the points referred to them, and have also collected a very large amount of useful information, not only from the United States, as to the working of the State and Interstate Commissions, but from English and other sources.

From the general tenor of the information, it would appear that in the United States the principle of Commissions as independent bodies was entirely in favour, the only question really being as to the extent and description of their power; and in this they differ to some extent in the various states, each state having complete power over the railways within its borders—the Interstate Commerce Commission only dealing with those railways running from state to state. This naturally causes a good deal of extra expense. In Canada, however, the Dominion Legislature has, speaking generally, the power to deal with the more important questions relating to railways, thus making the railway problem much more simple, and more easily managed.

The Railway Commission system has also been in force in England in various forms for many years, and there is now before the British Parliament a measure pointing to making the Commission permanent, with some changes, one of which is the appointment of a Superior Court Judge for each of the three parts of the empire, England, Ireland and Scotland, as *ex-officio* members, to be called in when any question of importance arises.

The Commission had under their consideration two systems under which the railways may be properly and fairly controlled; one of which was the independent Railway Commission, and the other using the Railway Committee of the Privy Council, through whom the necessary control could be obtained.

With regard to the first method, the Commissioners, apparently not wishing too hurriedly to advise a permanent Commission before the Interstate Commerce Commission has had another trial, as it has so far been less than a year in operation, and also to allow time for the passage of the proposed English Act making a permanent Commission, and also on the ground that none of the American Commissioners have sufficient power, and, for these reasons principally, do not recommend that a Commission of a permanent nature be at once appointed to deal with this all important question.

The second method before them was the extension of the powers of the Railway Committee of the Privy Council, who should hear and determine all disputes arising between railway companies, with power to appoint proper officers to take evidence locally.

The Committee itself to decide all questions of classification of freight tariff, and uniform railway returns.

The Committee to have power to appoint officers in each Province to hear and determine all complaints against railway companies, subject to the power of reference by such officer of any point to the Committee, and also subject to the right of appeal by either of the parties to the Committee itself.

The Commissioners apparently recommend this latter course as only a temporary expedient, as they say, "They think it better to test the working of the proposed law by temporary provision for its execution, and after fair experience of the results of the Interstate Railway Commission, and of our own legislation, to consider whether such system should be made permanent."

The Commission, when recommending this latter course, candidly admit that it has very serious defects. These are thus stated:

1. The members cannot leave their duties at Ottawa, and must therefore delegate to subordinates much very important work.

2. They hold their offices by "political tenure," and are liable to sudden changes, whereby the value of their experience is lost.

3. They can scarcely be regarded by the public as so absolutely removed from personal or political bias as independent members of a permanent tribunal.

4. They cannot possibly give their exclusive attention to their railway duties, and in taking upon themselves the duties which would necessarily devolve upon them, they would, in fact, be performing judicial functions. "Those and other reasons," as the Commissioners say, occur against the selection of the Railway Committee of the Privy Council as the Railway tribunal; but they say, "it is believed they are outweighed by the consideration of general and ultimate advantage," thus proceeding with "extreme caution" in dealing with subjects affecting the entire community, while a material practical advantage is secured by the fact that any required changes in the law, or in its application, are secured, thus identifying the Government with its execution.

From the fair manner in which the evidence and information obtained by the Commission has now been laid before the country, it is quite open to those who choose to do so, to discuss this all-important question from every point of view, and thus get the benefit of the ideas of many whose opinions are valuable, and who otherwise might never come forward to give them.

Having for several years back heard of the proposal to appoint a permanent Commission for the adjustment of railway matters, we naturally looked forward to that being the channel through which this great problem would be solved. But, while gladly testifying to the good work done by the Railway Commission, and being satisfied that great benefit will be ultimately derived from the information obtained and the report of the Commission, we must confess a certain amount of disappointment. That which many thought would be best, and looked for, was the appointment of an independent Commission free from political bias or control, and able to give their whole and undivided attention to the great railway problems constantly arising for solution. We doubt whether anything short of this will put the railway question on a permanent and satisfactory footing. But such a tribunal must be composed of first-rate men, well paid, and made perfectly independent, with powers limited and defined in a specific manner.

The Government could scarcely do otherwise than follow the recommendation of the Commissioners in reference to this Railway Committee. But it certainly would be warranted, in view of the information now gathered together, and reported to the Governor-General, in at once considering the constitution of, and necessary details connected with the appointment of a permanent body, which would give its entire time and consideration to the subject, and which would be able, from time to time, to recommend such legislation as might be deemed necessary. We think this the more as from the position occupied by the personnel of the proposed Railway Committee of the Privy Council, and from the

very grave objections to it mentioned in the report, this Committee cannot be looked upon as a permanent body.

Railways all over the world are becoming such busy and important factors in the commerce of the different countries, that their vast and complex systems will in the future form a separate study by itself, and it is only those who can give the subject the greatest and most continuous attention who can at all expect to grasp this vast mass of apparent incongruities. Canada is comparatively young in railways, but from the experience of our neighbours and the Continental countries, it will be well for us not to sit still and wait until the skein gets too much tangled, so that we may have to damage it in the unravelling. Now is our time; we are in a fair way of doing something, let us do it well, and not have to go back on our work and have to commence *de novo*.

In conclusion, it is most important that the persons constituting the Committee should not be subject to frequent change. They have much to learn which only experience can teach. It will be impossible, moreover, for men occupying the highly important and engrossing positions of Minister of Railways and Minister of Justice to do justice to the work that would devolve upon them. This work must necessarily include much detail, taking and consideration of evidence, etc., and any lawyer knows how unsatisfactory a decision is from facts gained at second hand, and arrived at in a hurry, trusting much to subordinates. Then again, the political aspect of the situation is most important, as no tribunal composed of political leaders can command the confidence of all.

We are not prepared to say that the Commission we speak of would be perfect, nor that the experience in the United States is entirely satisfactory; the public, moreover, as a rule, only know where the shoe pinches, and are not in a position to judge of the remedy—at the same time we trust the Government will shortly see its way to the appointment of some independent tribunal on a well-considered plan.

COMMENTS ON CURRENT ENGLISH DECISIONS.

MANDAMUS—RETURN TO MANDAMUS OF COMPLIANCE—PLEA TO RETURN TO MANDAMUS.

The only point worth noticing in *The Queen* v. *King*, 20 Q. B. D. 430, is the decision with regard to a point of pleading involved. A mandamus had been obtained requiring the defendants to hold a further adjournment of their annual general meeting, to hear and determine the application of the prosecutor for a certificate to hold an excise license to sell wine by retail. The defendants returned in effect that they had unconditionally complied with the writ; to which return the prosecutor pleaded that the defendants were only entitled to refuse the application upon one or more of the four grounds specified in a statute; but that they had refused the applications on other grounds contrary to

the statute. The Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) held that this plea was good in law, as it must be taken to mean that in refusing the application the defendants had assumed to exercise a jurisdiction which they did not possess, and that they had therefore not substantially heard and determined the matter submitted to them. Lopes, L.J., neatly sums up the point thus, at p. 441: "I am of opinion that a return of absolute obedience to a mandamus to justices to hear and determine a matter can be questioned by a plea in certain cases. If the plea sets up that the justices had determined the matter wrongly, it would be bad. If, on the other hand, it said that the justices did not hear and determine the matter it would be good. If it set up that the justices declined to exercise a jurisdiction which they had, and professed to exercise another jurisdiction which they did not possess, that, I think, would be good."

COMPANY—WINDING UP—PROHIBITION AGAINST CARRYING ON BUSINESS.

The Hire Purchase Furnishing Co. v. *Richens*, 20 Q. B. D. 387, is a case upon the construction of s. 131 of the Companies Act, 1862, which provides that a company being wound up voluntarily, shall, from the date of the commencement of such winding up, cease to carry on its business except in so far as may be required for the beneficial winding up thereof. The plaintiff company having sued the defendants for breach of a contract made after the company had commenced proceedings for a voluntary winding up, and the contract and breach being duly proved, it was held by the Court of Appeal (Bowen and Fry, LL.J.), affirming Grantham, J., that it lay on the defendants to show that the contract was not required for the beneficial winding up of the company, and that in the absence of such evidence the plaintiffs were entitled to succeed.

EXECUTOR INTERMEDDLING WITH ESTATE BEFORE PROBATE—INJUNCTION—RECEIVER.

Turning now to the cases in the Probate Division, we find only two which we think it necessary to notice. *In re Moore*, 13 P. D. 36, before probate, an executor without the consent of his co-executor intermeddled with the estate, and upon the joint application of the co-executor and a residuary legatee, leave was granted to issue a writ of summons for an injunction to restrain the intermeddling executor from dealing with the property, and for the appointment of a receiver.

AMERICAN DIVORCE—DOMICIL—NULLITY.

The only other case is *Turner* v. *Thompson*, 13 P. D. 37, which was a petition for a declaration of nullity of marriage. The petitioner being a domiciled Englishwoman, in 1872 went through a form of marriage in England with an American citizen. She cohabited with him until 1879 in the United States, and in April, 1879, the Supreme Court of Columbia pronounced a decree dissolving the marriage on the ground of the husband's incapacity. She then returned to England and presented a petition to the Divorce Court there, praying a declara-

tion of nullity of marriage, and it was held that as the marriage was voidable and not void, the petitioner had acquired an American domicil, that the American court had jurisdiction to dissolve the marriage, and there being no longer a marriage in existence, the English court had no jurisdiction. On the authority of *Harvey* v. *Farnie*, 8 App. Cas. 43, the President determined that the marriage, though it took place in England, was *prima facie* an American marriage, because the husband was domiciled in the United States.

FRIVOLOUS APPLICATIONS, FORM OF ORDER TO PREVENT.

In *Grepe* v. *Loam*, 37 Chy. D. 168, the Court of Appeal settled a form of order dismissing a frivolous application, and to prevent any such application being renewed without the leave of the Court.

PRACTICE—INTERIM INJUNCTION TO RESTRAIN LIBEL.

The case of *Liverpool Household Stores Association* v. *Smith*, 37 Chy. D. 170, is an instructive case on the principles on which the court will exercise its jurisdiction to grant *interim* injunctions to restrain the publication of libels. The plaintiffs were a joint stock company formed for the purpose of carrying on co-operative stores. Certain anonymous letters having been published in a newspaper reflecting on the credit and solvency of the company, this action was brought against the publisher of the newspaper to restrain the further publication of similar articles reflecting unfavourably on the company, and this was a motion for an *interim* injunction. But Kekewich, J., to whom the application was made, refused it, because he considered it would be difficult to frame any injunction which would express the object of the Court and at the same time avoid prejudicing the question at the trial: and on appeal, the Court of Appeal (Cotton and Lopes, L.JJ.) affirmed his decision. Cotton, L.J., says, at p. 183:

"In no case do I find an injunction granted such as is asked for here, an injunction as regards future publication of statements coming under such an indefinite description. Supposing we were to grant the injunction against 'libellous' letters, then it would have to be decided, on motion to commit, whether what was published was libellous or not, and that would be a most inconvenient course to be adopted."

And Lopes, L.J., says: "It is clear that since the Judicature Act the Court has power to restrain the publication of libellous or slanderous matter, if it is immediately calculated to injure the person or trade of any one against whom it is directed, but whether the jurisdiction should be exercised or not is a matter for the discretion of the Court."

PRACTICE—DISCOVERY.

Fennessy v. *Clark*, 37 Chy. D. 184, was an action to restrain the sale of goods under an alleged infringement of the plaintiff's trade mark, and claiming damages for false representations by defendant, that his goods were goods of the plaintiff's manufacture, or in the alternative, an account of the profits, and in which it had been ordered that the issues of fact should be tried by a special jury before a

judge; and the question arose whether, before the trial, the plaintiff was entitled to a discovery of the sales effected by defendant, and a production of his books for that purpose. Kay, J., dismissed the application with costs, on the ground that it was premature; and the Court of Appeal (Cotton and Lopes, L.JJ.) agreed that until the plaintiff had obtained the verdict of the jury, establishing the questions of fact in the action, he could not get the discovery he sought. The judgment of Cotton, L.J., proceeds on the ground that the order had been made, not for the trial of the action, but merely of the questions of fact in the action, and that the plaintiff had not elected between his claim for an account of profits and his claim for damages, and though the question of damages was a fact in question in the action, it was not one of the facts referred for trial, the order being confined, in his opinion, to questions of fact on which the plaintiff's title to relief depended.

COMPANY—WINDING UP—SHARES ISSUED AT A DISCOUNT—SHAREHOLDER, LIABILITY OF —CALLS.

In re Addlestone Linoleum Co., 37 Chy. D. 191, an appeal was taken from a decision of Kay, J., refusing certain preference shareholders leave to prove in the winding up, for an alleged breach of the contract between them and the company, whereby they became shareholders. The company was a limited company, and part of its capital had been issued in £10 preference shares at par, every present shareholder to be entitled to one preference share at 25% discount for each ordinary share held by him. The shareholders in question accepted the allotment of shares on these terms, and paid up £7 10s. per share. Subsequently the company was ordered to be wound up, and they were placed on the list of contributories, and calls for the £2 10s. per share were made and paid by them: for these calls they now claimed to prove in the winding up proceedings as damages for breach of contract in respect of the issue of the preference shares. But the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) were of opinion that the company had no power to issue shares at a discount; that the only remedy of the shareholders against the company, if any, was to have a rescission of the contract, but as that, owing to the winding up, could not now be had, they were without remedy. The cases of *Ince Hall Rolling Mills Co.*, 23 Chy. D. 545, and *In re Plaskynaston Tube Co.*, *ib.* 542, in which it was held that a limited company could issue shares at a discount were distinctly disapproved, as also *Mudford's Claim*, 14 Chy. D. 634, and *Ex parte Appleyard*, 18 Chy. D. 587.

PRACTICE—SERVICE OUT OF JURISDICTION—RES JUDICATA.

In *Societé Generale* v. *Dreyfus*, 37 Chy. D. 215, an application had been granted by Pearson, J., to serve a writ out of the jurisdiction. After the order was made, litigation in reference to the subject matter of the action (which was a fund in the English Court) took place in the foreign country, which resulted in an adjudication that the defendants were entitled to the fund in question. On an appeal from the order of Pearson, J., the Court of Appeal held that the subject matter of the action being within the jurisdiction, the plaintiff's claim was one within

Ord xi., r. 1, yet the court had a discretion, and, under the circumstances, leave to serve the writ out of the jurisdiction should not be granted, and the order of Pearson, J., was therefore rescinded.

PRACTICE—MODE OF TRIAL—JURY—COUNTER-CLAIM.

In *Lynch* v. *Macdonald*, 37 Chy. D. 227, the action was for redemption of mortgaged shares. The defendant filed a counter-claim seeking relief incident to his position as mortgagee, and also damages for alleged fraudulent misrepresentations made by plaintiff to defendant. The plaintiff applied to have the action tried by a jury, which North, J., refused. The Court of Appeal (Cotton and Fry, L.JJ.) held that the case did not come within Ord. xxxvi. r. 6, so as to give the plaintiff the right to have the action tried by a jury, but that his proper course was to have applied to have the counter-claim for damages disallowed, or tried separately, as a claim which could not be conveniently tried in the action.

FOREIGN JUDGMENT, ACTION ON.

In re Henderson, Nouvion v. *Freeman*, 37 Chy. D. 244, the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) decided that a judgment of a foreign tribunal upon which an execution may issue, but which is not a final and conclusive judgment between the parties, according to the law of the foreign country in which it has been recovered, cannot be sued on in England, or enable the plaintiff to obtain administration of the defendant's estate, he having died.

DEBENTURE AND DEFINITION OF.

Perhaps the only point worth noticing in *Levy* v. *Abercorris Slate Co.*, 37 Chy. D. 260, is Chitty's, J., definition of the word debenture. He says at p. 264: "In my opinion a debenture means a document which either creates a debt, or acknowledges it, and any document which fulfils either of these conditions is a 'debenture.'" See, however, remarks of North, J., *Topham* v. *Greenside Fire-Brick Co.*, 37 Chy. D. 290.

PRACTICE—PARTICULARS—FRAUD.

Sachs v. *Speilman*, 37 Chy. D. 295, was an action by a principal against his stock broker to open settled accounts on the ground of fraud. The statement of claim alleged that the plaintiff was unable to give particulars before discovery. The defendant, before delivering a defence, applied for particulars. North, J., ordered the application to stand till a statement of defence had been put in.

WILL—GIFT OF INCOME TO A CLASS—ASCERTAINMENT OF CLASS.

In re Wenmoth, Wenmoth v. *Wenmoth*, 37 Chy. D. 266, Chitty J., decided that there is a distinction between the rule by which a class is to be ascertained, when the gift is of a *corpus*, and when the gift is of income merely; and while for convenience sake the class is to be ascertained in the case of a gift of a *corpus* when the first member of the class becomes entitled to his share, because the trustees could not otherwise ascertain what is the aliquot share of a member

of the class until the class closed ; yet in the case of a gift of income, there being a periodical distribution, that rule does not apply, and when the gift is to a class of children, who shall attain twenty-one, the date of the first attaining twenty-one is not the date for ascertaining the class, but that any child, at any time attaining twenty-one, would be entitled to a share of the income.

WILL—ADEMPTION—LUNACY AFTER MAKING OF WILL.

The only other case we think it necessary to notice is *In re Larking, Larking* v. *Larking*, 37 Chy. D. 310, in which North, J., decided that where a testator had bequeathed a policy on his own life in trust to pay two debts due by himself, and to pay the balance to his daughter, and subsequently paid off one debt, and then became a lunatic, and his committee voluntarily paid off the other: that the daughter was entitled to the money received on the policy less the debt paid off by the committee as to which there was no ademption, because the act of the committee without the authority of the court could not alter the right of the parties interested in the lunatic's estate on his decease.

Reviews and Notices of Books.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND. Third Edition. Oxford: Clarendon Press.

The series of treatises to which this work belongs, and of which it is one of the older members, is an important and valuable contribution to the literature of Political Science. It includes such works as Stubb's "Constitutional History of England," Markby's "Elements of Law," Anson's "Principles of the English Law of Contract," and the last-named author's "Law and Custom of the Constitution." Alike in point of form as philosophical treatises, and, from a student's point of view, as useful text-books, these manuals seem to come as near to perfection as it is possible for treatises to come. As each of the subjects dealt with is a progressive department of one of the most progressive of sciences, it follows that even such works as these must sometime be superseded, but for the present they leave nothing to be desired in the sphere they aim at occupying.

The appearance of this third edition of Prof. Holland's treatise is the best proof that its value is appreciated, and from the author's own statement it is evident that its popularity is not confined to England, for in the preparation of this edition he has taken advantage of foreign as well as of home criticism. Nor is there anything in this to be surprised at, for the study of law has been, during the greater part of this century, carried on more scientifically in the United States than in England, and more scientifically in India than in either. The work done in the Harvard Law School, ever since Mr. Justice Story became associated with it, has exercised a most important and beneficial influence on

jurisprudence, and the methods pursued there are now avowedly followed by those who have in their hands the direction of legal education in England. When the time comes for taking a step forward in the matter of scientific legal training in Ontario, it is to be hoped that, in the light of the experience alike of England and the United States, it will be taken in the right direction.

There is one feature of Prof. Holland's work which seems to us a real defect, all the more to be regretted because it is easily removable. The nature of his subject requires him to give many definitions, and to cite many opinions from authors who have written treatises in other languages; and, in the great majority of cases, even where they occur as parts of the text, his citations are not translated. It is absolutely necessary in the interest of precision that when a quotation is given from Aristotle, or Savigny, or Cicero, or Vattel, it should be given in the original Greek, or German, or Latin, or French; but if the original is part of the text, a correct translation should be given as a foot-note, and if the quotation is given as a translation in the text, then the original should appear as a foot-note. Sometimes the difficulty of presenting both original and translation is overcome in a manner at once ingenious and effective, as when the author says (p. 67): "Law is something more than justice. Its ultimate object is, no doubt, nothing less than the highest well-being of society: and the State, from which law derives all its force, is something more than a 'Rechtsversicherungsanstalt,' or 'Institution for the protection of rights,' as it has not inaptly been described." Again, on p. 212: "Savigny's analysis of contract, substantially accepted by the majority of the more recent German authorities, is to the following effect. Its constituent elements are, he says, (i.) several parties, (ii.) an agreement of their wills (Sie müssen irgend Etwas, und zwar Beide dasselbe, bestimmt gewollt haben), (iii.) a mutual communication of the agreement (Sie mussen sich dieser Uebereinstimmung bewusst geworden seyn, das heisst der Wille muss gegenseitig erklärt worden seyn), (iv.) an intention to create a legal relation between the parties." The insertion of so much matter as is found here in foreign garb is not in this case any proof of pedantry, and is not therefore an offence against good taste. It seems to be due to the author's forgetting that law students are not all, in any English speaking country, able to read Greek, Latin, French, and German treatises in the original. Prof. Holland's work would be made at once more popular and more useful if this improvement were made.

The exact position of this admirable text-book in the bibliography of jurisprudence is easily determined. The labours of Bentham made it evident that the feudal customs and common law of England did not suffice as a foundation for a complete formal science of positive law. The first scholar to work upon, if not to clearly perceive, this fact was the late John Austin, who was in 1826 appointed professor of jurisprudence in the University of London. The lectures he delivered were published in 1832, and on the foundation he then laid Prof. Holland and others have built. As a formal treatise, Austin's work is extremely unsatisfactory, just as Smith's "Wealth of Nations" is to a modern student of political economy; but no excellence of any subsequent treatment can ever

overshadow the great value and importance of the work done by Austin—done, too, in the midst of suffering and discouragement which few pioneers of science are ever called on to endure. Holland's work is a systematization of Austin's, but it is a great deal more. He has, through his wide acquaintance with the works of the great jurists of Europe, been enabled to modernize as well as systematize the science, and he has conferred untold benefit on the student by the lucidity of his treatment, the correctness of his classification, and the perspicuity of his definitions. It is surprising that no one should have made any effort to supplement Austin's fragmentary work during the long period of twenty years or more which elapsed after the author's death, but it must be borne in mind that the scientific study of positive law was at a discount during much of that time, and that such treatises as Holland's and Markby's are the result, quite as much as the cause, of the infusion of a more scientific spirit into legal education.

One of the agencies at work in bringing about this great change for the better, was the rise of the historical school, of which the late Sir Henry Maine is the most distinguished English representative. His "Ancient Law," published about the time of Austin's death, marks an epoch in the history of legal learning and legal education. No more instructive task can be assigned to a law student than that of making a comparison between Maine's "Ancient Law" and Holland's "Jurisprudence." The one is almost entirely historical, the other almost purely analytical, in its treatment of the subject. The one is an admirable complement of the other, each of each, and together they are an indispensable part of a good law course, whether for university culture or professional training. Each treatise is all but perfect, perfect of its kind; and there is no other work in any language, so far as we are aware, that will serve so well the purposes they are intended to serve.

On one important point Holland has ventured to differ not merely from English specialists like Anson and Pollock, but also from so great an authority as Savigny, whose view of the subject is generally accepted abroad as well as in England. Savigny, in the passage quoted above in another connection, says that there must be an agreement of the wills of parties to a legal contract. Holland prefers the view that "the law looks not at the will itself, but at the will as voluntarily manifested," and he adds, "If, for instance, one of the parties to a contract enters into it, and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless." This view, which in his first edition he puts forward "with some diffidence," is in this edition "re-stated with more confidence," as it has made converts in both England and Germany. It is not our place to decide when such men as Holland and Anson disagree, but those who desire to see what can be well said on each side should read Holland's remarks on p. 212 *et seq.* of this edition, and Anson's remarks on pp. 10–13 of his second edition. The point is one of practical, no less than of scientific, interest, and it is to Prof. Holland's credit that he has had independence enough to take a line of his own in the face of authorities so eminent and so generally deferred to.

It is needless to say that this work, like all others from the Clarendon Press, is a model of typographical accuracy and good taste.

Notes on Exchanges and Legal Scrap Book.

"I CANNOT TELL A LIE" (*Washington*).—The editor of that excellent periodical, the *Albany Law Journal*, thus soliloquises :—

"We seldom read our *Journal*—after reading the proofs. But casually taking up the last number and glancing over its contents, it struck us as a remarkably interesting number—no vanity, now, for it is not our fault—but it seemed to us to chronicle and comment on an unusually large number of novel and striking cases, to say nothing of the current topics, for which we are too modest to take any credit."

We are glad we came across this precedent. A similar thought struck us as we casually glanced at the last number of *our* JOURNAL. But for the simple candid boldness of our contemporary, our view of ourselves would have perished with us.

THE *Irish Law Times* tells of a novel decision by two of its fellow-countrymen, who are justices of the peace. The plaintiff brought an action to recover possession of a house and garden held by the defendant, as herd and caretaker of the late husband of the plaintiff. It was a term of the agreement that the defendant was to receive a fortnight's notice to quit. The plaintiff had sent this notice by a boy who could not read; the defendant produced the notice, and admitted the receipt of it; but said he also could not read. The justices held that, as the notice was not read to the defendant, and he could not read it himself, there was not sufficient notice, and dismissed the case. Under this decision, it seems to follow that a man who could not read, and in addition was stone deaf, would have a perpetuity of tenure under a like contract.

THE Act under which Mr. Justice Grantham sentenced two prisoners at Liverpool to six months' imprisonment, and to be twice whipped, is 7 & 8 Geo. IV. c. 28, s. 11, and the necessary conditions of such a sentence, are that the prisoner is convicted of felony for the second time. The term of imprisonment may be four years, and the sentence may include, in the case of a male, "that he be once, twice, or thrice publicly or privately whipped in addition." This drastic measure, as was said, has been long forgotten. The practice has been to give penal servitude for repeated offences, and not to act under a statute so obsolete in its application to existing modes and principles of punishment as to contemplate imprisonment for four years and public whippings. On further consideration, the learned judge has altered the sentence to the ordinary sentence of five years' penal servitude. It would be as well, now that attention has been drawn to the Act, that it should be formally repealed.—*Law Journal* (Eng.).

THE *Central Law Journal* of St. Louis, discusses the detective system in a recent editorial. The question is one which is of more than common interest in connection with the recent Montreal disclosures. The temptations to which detectives are exposed are numerous and trying, and the necessity of as much watching as from the nature of their employment it is possible to give them, is evident. Detectives, as a class, need, from the nature of their avocation, more supervision than they can possibly receive, and more thorough legal regulation and restriction than any legislature has as yet imposed upon them. This need is great with reference to regular legal officers of this class; *a fortiori* the need is much greater with reference to the numerous private "detective agencies," intelligence offices, etc., whose doings, like many other things in this world, "are past finding out." Why should not all such officers be directly under the control of the sheriff, and obliged to report at regular and frequent intervals to that officer concerning everything done by them in attempting to ferret out crime. The offering of large rewards for the discovery of crime, especially when they are payable only on conviction, is against public policy, and should be prohibited by law.

OF all justices itinerary the most locomotive are the Railway Commission. They have power to hear cases now in Ireland and now in Scotland, and, free from the trammels on adjournment which gave some trouble when the Tichborne case was adjourned across the street, they adjourn from Westminster to Willesden, carrying a case *sub judice* with no more difficulty than taking first-class tickets. If the convenience of the witnesses require it they are prepared to sit at night, so as not to take railway porters away from their work. We believe them capable, if it were consistent with the safety of the public, of taking depositions and cross-examining a witness in a signal box, utilizing the intervals between the passing trains. This is a revolution in the slow-moving habits of judicial tribunals, which usually look upon energy as inconsistent with dignity, and generally do not study the convenience of anyone, unless it happens to coincide with their own. The Railway Commission deserve every credit for inaugurating a new era of judicial alacrity. It is to be hoped that during the session they will obtain those further powers which are designed to give their energies greater scope.—*Law Journal* (Eng.).

THE JURY PROBLEM.—The March number of the *Columbia Law Times* has a leading article on jury reform and the law of unanimity. Having stated the functions of juries in regard to the facts as distinct from the law, the writer examines the causes of inefficiency in the performance of these functions. These causes are extrinsic and intrinsic. The intrinsic defect of the institution, in his opinion, is the requirement of unanimity. He contends that the requirement of unanimity affords no reasonable security which is not equally well afforded by a majority; that public confidence in the administration of justice would be in-

creased when the probability of trials being abortive, owing to the disagreement of juries, would no longer exist; that the extinction of the coercive element by the agency of close confinement would tend to greater candour on the part of individual jurors; and that the two ulcers of the jury system—bribery and jury-fixing—would speedily disappear. Corruption is much less practicable where a majority must be made to succumb to its influence. The desire of gain can no longer lead worthless jurors to seek profit from their position. The writer of the article recognizes the distinction, properly made, between civil and criminal cases. The former should be decided by the preponderance of probability, the latter demands reasonable certainty. In the former a majority of two-thirds or three-fourths should be sufficient for a valid verdict, in the latter unanimity is desirable.

CODE OF ETHICS.—A kind friend has sent us a copy of the Code of Ethics adopted by the Alabama State Bar Association, December 14th, 1887. The influence of professional training, example and opinion, we think, ought to be sufficient to so mould the views and conduct of all who become members of any learned profession, and to imbue them with so strong an instinctive feeling of what is becoming and honourable, that a code, such as this before us, would be a piece of useless lumber. Unfortunately such is not always the case; there are those in all professions who, by excess of zeal, lack of knowledge, or want of principle, transgress the limits, not merely of propriety, but even of fair play. For such people, rules and laws which cannot be transgressed without the loss of professional status, may be necessary. They may also be of service to indicate to those who are without the pale, the lines of conduct to which worthy members of the profession seek to conform, and the high ideal after which they strive. The public, too, have therein a criterion by which they may judge the conduct of those who are entrusted with the custody of their most valuable interests, and learn to esteem them according to their deserts. The code adopted in Alabama seems quite full and complete, and if the spirit of its rules pervades the conduct of those for the guidance of whom it is drawn, the legal profession in that State will be entitled to the respect of everybody.

THE decision of Mr. Justice Hawkins in *Wynn* v. *Lees* is not so important as his celebrated decision in *Read* v. *Anderson*, which decided that a man who bets on commission, loses and pays, can recover what he has paid from his principal. It is now decided that a man who bets for his friend, and wins, must hand over the winnings. The difficulty in *Read* v. *Anderson* was as to the effect of the defendant withdrawing his authority from the plaintiff before the plaintiff paid the money. No such difficulty exists when the winner is suing for a bet made on his behalf. When the case of *Read* v. *Anderson* came before the Court of Appeal, the Master of the Rolls differed from the majority of the judges, but in the case of *Bridger* v. *Savage*, 54 Law J. Rep. Q. B. 464, he agreed with his

brethren that a commission agent who wins must pay his principal, and the contrary view which had been taken by Vice-Chancellor Stuart in a Chancery case was overruled. The Wagering Act may therefore be eliminated from the present question, which is simply a question of contract. Suppose a man were to say to his friend that he will give him all his winnings on horses on which he bets in his name. In that case his friend could not recover the winnings because there was no consideration for the promise. But if two men agree that one shall bet for the other, the contractual relation of principal and agent arises, although the agent has no commission. The agreement by the principal to pay losses is a sufficient consideration.—*Law Journal* (Eng.).

Bickford v. *Menier* was a decision of the Court of Appeal of the State of New York, in regard to the law of principal and agent, reported in *The Central Law Journal*, from which we take the following synopsis of the points involved in the judgment:—

1. "A principal is bound only by the authorized acts of his agent.

2. The agent's authority may be proved by the instrument or verbal commission creating it; and, in addition thereto, it may be shown that the principal has held the agent out to the world in other instances than the one under inquiry, as having an authority which will embrace the particular act in question, but no act can be resorted to for the purpose of establishing a power not included within the terms of such instrument or commission, except those which are brought to the knowledge of his principal, and which are approved or acquiesced in by him.

3. Only a person who has dealt with an agent, and who believed, and had a right to believe, that such agent was acting within, and not exceeding, the scope of his authority, and who would sustain a loss if the act was not considered that of the principal, can hold the latter.

4. The principal is bound by the acts of his agent which are necessary for the exercise of all powers expressly authorized; or which are essential and necessary to the execution and performance of the express purposes described in his commission.

5. A naked power to receive property from abroad, sell it, and remit the proceeds to the principal sending the property, does not authorize an agent to borrow money to carry on his principal's business with, even though the agent be at the head of a regularly established store or place of business.

6. If the transaction of the business absolutely required the exercise of the power to borrow money in order to carry it on, then that power is impliedly conferred on an incident to the employment, but the fact that the act proposed is convenient or advantageous, or more effectual in the transaction of the business provided for, is not sufficient, it must be practically indispensable to the execution of the duties really delegated."

DIARY FOR APRIL.

1. Sun.....*Easter Sunday.*
2. Mon....Easter Monday. C.C. York sit. for motions begin
3. Tues...C.C. non-jury sittings, except York.
7. Sat. ....C.C. York sittings for motions end.
8. Sun.....*1st Sunday after Easter.*
14. Sat. ....Princess Beatrice born, 1857.
15. Sun.....*2nd Sunday after Easter.*
17. Tues....C.C. non-jury sittings in York.
22. Sun.....*3rd Sunday after Easter.*
23. Mon....St. George's day.
25. Wed....St. Mark.
29. Sun.....*4th Sunday after Easter.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Street, J.] [Feb. 27

In re ROBERTSON AND TOWNSHIP OF NORTH EASTHOPE.

Municipal corporation—Drainage by-law—Municipal Act, 1883, *ss.* 570, *et seq.*—*Majority of land owners* — *"Mechanical operations"* — *Notice* — *Allowance of lump sum for roads—Duties of engineer.*

Upon a motion to quash a by-law providing for the assessment of certain owners of land for the cost of drainage work for the benefit of their land, under ss. 570 *et seq.* of the Municipal Act, 1883;—

Held, 1. That the petition of land-owners for such by-law should include a majority of all the persons whom the engineer finds to be benefited by the proposed work.

Re Romney and Mersea, 11 A. R. 712, and *Re Dover and Chatham*, 12 S. C. R. 321, followed.

2. That the engineer is at liberty to leave out of his scheme portions of the land mentioned in the petition, and the calculation as to the necessary majority should be made without considering the owners of such land.

3. That a petitioning land-owner has the right to withdraw his lands from the scheme before action has been taken under the engineer's report, and that if he does so he should not be reckoned as a petitioner in making the calculation, *Re Misener and Wainfleet*, 46 U. C. R. 457, followed.

4. But even where, applying these principles, it is determined that the proper proportion of persons interested have not petitioned, a by-law valid on its face, passed by the council without objection, and under a *bona fide* belief, concurred in at the time by all parties concerned, that they had been properly set in motion, should not be quashed.

5. The words "mechanical operations," in ss. 8, of s. 570, of the Municipal Act must not be read in their widest sense; the provisions of the sub-section, requiring a two-thirds majority, are not intended to apply to every case in which it may become necessary to build or heighten a bank at the side of a drain, or to strengthen it in places by the addition of timber or logs.

6. The applicants to quash the by-law, having followed in their application the notice given by the council under s. 572 to intending applicants, should not be prejudiced because that notice was incorrect; the council must be held to their own notice.

7. The allowance in the engineer's report of a lump sum as "chargeable to municipality for roads" was sufficiently definite, there being only one municipality concerned. *Re Essex and Rochester*, 42 U. C. R. 523, distinguished.

8. The engineer, having himself made an inspection of each lot, and estimated how much each would be benefited by the drain, might properly delegate to an assistant the duty of making a calculation upon the basis established by him.

Lash, Q.C., and *J. E. Harding*, for the applicants.

Idington, Q.C., for the township.

Armour, J.] [Aug. 11, 1887.

BOYD *v.* SULLIVAN.

Contract—Goods not all deliverable at once—Payment—When due—Refusal to pay for part delivered—Refusal to deliver remainder.

Plaintiff and defendant entered into the following contract:—

"To G. M. B. (plaintiff): Please deliver me, at Port Arthur, five head good steers on first 'City' up (first trip up to Port Arthur of boat

'City of Owen Sound'), and six steers and heifers on second trip 'City' up, and four cows on same trip; also 100 good lambs in lots of 15 or 20, of $3 each lamb, to dress not less than ten pounds per quarter—price of cattle, $3.50; weighed at Port Arthur."

Nothing was said as to time of payment.

Held, that the price was payable upon each delivery, and that the refusal of the defendant to pay for the part delivered justified the plaintiff in refusing to deliver the remainder.

G. T. Ware, for plaintiff.

A. R. Lewis, for defendant.

Full Court.] [Mar. 9.

ONTARIO LOAN AND DEBENTURE CO. *v.* HOBBS.

Landlord and tenant—Mortgage—Re-demise clause, construction of—Creating tenancy—8 Anne c. 14 s. 1.

In a mortgage of lands under the Short Forms Act there were the usual covenants and provisoes, except the attornment clause and the provisoes that the mortgagee may distrain for arrears of interest, and that until default the mortgagor shall have quiet possession, which were omitted; and there was a re-demise clause setting out that the mortgagees leased the mortgaged lands to the mortgagor from the date of the mortgage until the date provided in it for the last payment, the mortgagor paying in every year during the term on each of the days appointed for payment by the redemption clause such rent or sum as should equal the amount payable on such days according to such clause, such payments to be taken to be in satisfaction of the moneys payable under such clause.

There was no other provision in the mortgage which could be taken as creating a tenancy.

Held, that under the mortgage, without the re-demise clause, the mortgagor, upon the execution of the mortgage, became at most a tenant by sufferance; and the re-demise clause was void as a lease or as creating a tenancy, because it was for the whole term of the mortgagee's interest, and because being for a longer term than three years, it was not by deed, the mortgage not having been executed by the mortgagees.

As the mortgagor did not enter under the void lease, being already in possession, he could not be regarded as a tenant at will whose tenancy had been changed into one from year to year by virtue of payments made according to the intended lease, but must be considered as a mortgagor in possession.

Properly construed, the re-demise clause was merely a provision that the mortgagor should remain in possession until default.

Held, also, upon the evidence, that the relationship of landlord and tenant was never intended to be created in reality; and, not having been technically created, there was no tenancy in law or in fact, at a rent reserved, such as would, under 8 Anne c. 14, s. 1, entitle the mortgagees as to goods seized upon the lands in question to a preference over other creditors of the mortgagor.

Full Court.] [Mar. 9.

KENNEDY *v.* OLDHAM.

Specific performance—Contract for sale of land—Statute of frauds—Written offer by purchaser not addressed to vendor—Contract completed by correspondence and initials on offer book.

An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents.

The offer was not addressed to anyone, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents.

Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the statute of frauds to bind the defendant.

Lefroy, for the plaintiff.

J. Maclennan, Q.C., and *D. Urquhart*, for defendant.

Chancery Division.

Rose, J.] [Nov. 24, 1887.

WHALLS *v.* LEARN *et al.*

Infancy—Exchange of lands by infant—Compromise of proceedings for benefit of infant the result of which was that she could not make restitution — Circumstances under which court will refuse to aid infant.

M. J. W., the plaintiff, being an infant married woman, borrowed money from the defendant G. on a mortgage of fifty acres of land owned by her, and with that money purchased ten acres of land, which was subject to a mortgage. She then made an exchange with the defendants L. and G., by which she conveyed to them her equity of redemption in the fifty acres in consideration of a release of the covenants of her and her husband in the mortgage, and a conveyance of three acres from L., which three acres were also subject to a mortgage. The mortgages on the ten acres and on the three acres having both come into the hands of one S. He made her a further advance, and a new mortgage was made to him for the whole amount, and the old mortgages discharged. S. then discovered that M. J. W. was under age, and took proceedings to have the discharges cancelled, and the old mortgages reinstated, in which proceedings the official guardian intervened on behalf of M. J. W. as an infant. The result of this was a compromise in the interest of the infant, and afterwards with the approval of the guardian, M. J. W. and her husband being unable to redeem, an order was granted vesting the equity of redemption in S. on the payment of $100, which was paid.

In an action to set aside the deed of the fifty acres, on the ground of infancy, it was

Held, following *McDougall* v. *Bell*, 10 Gr. 283, that although the suit in which the compromise was made, was not instituted by the infant, yet as the compromise was at her instance and for her benefit, and as she was not in a position to restore the defendants to their original position, she could not succeed.

Ermatinger, Q.C., for the plaintiff.
J. M. Glenn, for the defendants.

Full Court.] [Mar. 1.

WHALLS *v.* LEARN *et al.*

Married Woman—Infancy—Double disability—Seeking to avoid conveyance, must make restitution—Laches—Short delay.

The facts appear from the preceding note of this case.

Held, (reversing ROSE, J.) that the plaintiff should be allowed to recover back the fifty acres on payment of the mortgage money obtained from G. and interest, and the value of the three acres which she received as the consideration of the conveyance of the fifty acres, and that the short delay of two months and thirteen days should not, without more, bar the plaintiff.

Per BOYD, C.—By the law, the disability attaching to a *femme covert*, who is an infant, is not removed, so far as the infancy is concerned; in that respect both sexes are alike incompetent. But apart from infancy, she may deal with her land as a *femme sole*. The effect of the legislation is to give to the conveyances of married women (who are infants) the same characteristics as are by law attributed to the conveyances of male infants, *i.e.* if such deeds are of benefit to the infant, or operate to pass an estate or interest they are regarded as voidable only, and not mere nullities. The plaintiff cannot have the aid of the court without making complete restoration to the defendants of the specific or equivalent value of that which she received from them during nonage.

F. E. Hodgins, for the plaintiff.
J. M. Glenn, for the defendants.

Boyd, C.] [Feb. 14.

REINHART *v.* SHUTT.

Mechanics' lien—Mortgage—Prior or subsequent incumbrances.

The plaintiff worked on a barn of defendant's up to August 9, 1887, and did some further work on October 25 following. The defendant mortgaged his land to A. S., by mortgage dated October 21st, and registered October 24th. The plaintiff registered his lien October 25th, and having brought his action against defendant only, obtained the usual judgment,

with a reference to the Master. The Master made A. S. a party to the suit in his office, and A. S. petitioned to have the Master's order set aside.

Held, following *McVean* v. *Tiffin*, 13 A. R., that the mortgage was not a subsequent, but a prior mortgage as regarded the plaintiff's lien, and that the Master should not have added A. S. the mortgagee, as a party.

Field, and *W. M. Douglas*, for the petitioner.

Shepley and *E. O'Connor*, for the plaintiff.

Boyd, C.] [Feb. 14.

WEST *et al. v.* PARKDALE *et al.*

Damages, Measure of—Evidence—Injury to land—Injury to business—Prospective value of land.

The defendants having built a subway in front of the plaintiff's property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, and seriously injure the same, under the circumstances set out in 7 O. R. 270, 8 O. R. 59, 12 O. R. 393, 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an official referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference the referee ruled (1) that the measure of damages was the difference in value of the property before and after the construction, with interest added; (2) that the prospective capabilities, or value of the land, could not be taken into account, except so far as such elements enter into the computation of the then market value, or have regard to what would have been the present value of the property had the subway not been constructed; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling, it was

Held, that the corporation were liable as wrong-doers, who were not protected from the consequences of their tort by any statutory provision, and they should make good all damages sustained for which an action would lie for their unauthorized act, such damages being of a two-fold character, involving injury to the plaintiff's land and to his business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads.

Held, also, that evidence might be received of the present value of the property, with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value. The evidence must be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and the potential value of the property.

Cassels, Q.C., and *H. Cassels*, for the plaintiffs.

Osler, Q.C., and *J. H. Macdonald*, Q.C., for the defendants.

Robertson, J.] [Feb. 24.

Re FRAGNOR AND KEITH.

Vendor and Purchaser Act—R. S. O. c. 109 (1887)—Will—Devise—Estate limited "to heirs but not to assigns"—Fee simple.

A devise in a will worded as follows, "I also will and bequeath to my daughter, L. A., the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married, and had issue. In an application under the Vendor and Purchaser Act,

Held, that she took an estate in fee simple.

D. A. Givens, for vendor.

E. H. Britton, for purchaser.

Robertson, J.] [Feb. 24.

Re COLLITON *v.* LANDERGAN.

Will—Devise—Restraint on alienation—Estate tail.

A testator by his will provides as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my real estate . . . Said estate being composed . . . I leave and bequeath the aforesaid estate to my son, J. C., after my wife's death . . . and the said estate is not to be sold or mortgaged by my son, J. C., but is to belong

to his heirs. Should my son, J. C., die without heirs then the estate . . . My daughters shall get their maintenance of said estate during . . . I also bequeath the sum of $80 to each of my daughters . . . To be paid out of the said estate by my said son, J. C." In an application under the Vendor and Purchaser Act it was

Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject however to the charges of the several legacies to each of the testator's daughters.

W. H. Moore, for the vendor.

L. M. Hayes, for the purchaser.

Full Court.] [Mar. 1.

WANTY *v.* ROBINS *et al.*

Mechanics' lien — Equitable interest in the land—Fraudulent scheme to evade lien—Notice—Registry Act—Innocent Purchaser.

A. and P. agreed to sell certain land to R., and one of the terms of the agreement was that R. should start building on the said lot at once. R. commenced to build, and W., the plaintiff, was his contractor, who did certain work, but had to cease working because he was not paid; the last of the work being done August 22nd. While this work was going on C. W. entered into negotiations with R. to purchase the rear part of the land, which fell through, but an understanding was subsequently arrived at by which R. was to release to A. and P. his right of purchase, and C. W. was to purchase the whole of the land from them, and at the expiration of thirty days convey the front part to R. The release was executed, and the deed from A. and P. was taken, not to C. W., but to the defendant, A. M. W., who was C. W.'s wife. The deed was dated August 30th, and registered the following day, and plaintiff's lien was registered September 15. It was found by the trial judge that C. W. and A. M. W. had notice of the plaintiff's claim before the date of the deed, and that the deed to A. M. W. was a scheme to defeat the plaintiff's claim.

Held (affirming ROBERTSON, J.), that the plaintiff's lien attached on the interest of A. M. W.

The law that a lien which arises by virtue of being employed, and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser, who registers his conveyance, must be restricted to an *innocent* purchaser, who is entitled to the protection of the Registry Act.

T. P. Galt, for the plaintiff.

Arch. McLean and *R. L. Fraser*, for defendant Wood.

Full Court.] [Mar. 1.

MCLEAN *v.* BROWN.

Contract for sale of goods — Material condition of shipment — Refusal to accept—Action for deposit and damages.

McL. Purchased lambs from B. to be shipped to McL., B. & McL., which condition he says he inserted "to help our business . . . and to help build the firm up," the firm being a new one. B. disregarded this condition, and shipped them to another name, and McL. refused to accept. In an action for the deposit paid at the time of the contract, and for damages, it was

Held (affirming ROSE, J.), that the term of the bargain as to the manner of consignment was a material part of it, material to the plaintiff, as the defendant well knew, and following *Bowes* v. *Shand*, L. R. 2 App. Cas. 455, that the plaintiff must succeed.

Mornington v. *Wright*, 115 U. S. Rep. 188, referred to and quoted.

McCarthy, Q.C. for the appeal.

Aylesworth, contra.

Divisional Court.] [Mar. 1.

BOYD *v.* SULLIVAN.

Contract—Goods not all deliverable at once—Payment—When due—Refusal to pay for part delivered—Refusal to deliver remainder.

Plaintiff and defendant entered into the following conttact:—

"To G. M. B. (plaintiff): Please deliver me, at Port Arthur, five head good steers on first 'City' up (first trip up to Port Arthur of boat 'City of Owen Sound'), and six steers and heifers on second trip 'City' up, and four cows on same trip; also 100 good lambs in

lots of 15 or 20, of $3 each lamb, to dress not less than ten pounds per quarter—price of cattle, $3.50; weighed at Port Arthur."

Nothing was said as to time of payment.

Held (reversing Armour, J.), that the price was not payable till completion of whole contract, and that the refusal of the defendant to pay for the part delivered did not justify the plaintiff in refusing to deliver the remainder.

Per FERGUSON, J.—The contract being entire, and containing no stipulation regarding the manner or time of payment, the defendant was entitled to refuse to pay for the part that had been delivered until the remainder should be delivered, and the refusal of the plaintiff to deliver the remainder was not justified, and was a breach of the contract.

Per BOYD, C.—If the contract is entire the price was not payable until all the deliveries were completed; if it is divisible *quoad* the cattle and the lambs, so as to be in effect two contracts, the failure to pay for the cattle by the one party would not excuse the other in not forwarding the lambs within the time limited. When there has been partial delivery and consumption of that part, and failure to perform the rest of the contract, the seller has the right to sue as upon a *quantum meruit*, and the purchaser has his cross-action or counter-claim for damages, and such is the position of affairs in this case.

Withers v. *Reynolds*, Q. B. & Ad. 882, considered and distinguished.

Aylesworth, for the appeal.

D. Morrison, contra.

Practice.

Q. B. Divisional Court.] [Mar. 9.

In re JOHNSON *v.* THERRIEN.

Prohibition—Division Court judgment against garnishee—Proof of amount due—49 Vict. c. 15, s. 12—Money paid into court.

Held, reversing the decision of STREET, J., in Chambers, that the judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor, and for such a course prohibition will lie.

There is nothing in the sub-section substituted by 49 Vict. c. 15, s. 12, for R. S. O. (1877) c. 47, s. 136, ss. 2, which repeals the condition precedent in s. 132, to the judge's giving judgment against the garnishee.

Held, also, that, if necessary, the writ of prohibition should go to compel the repayment to the garnishee of money paid by him into the Division Court.

J. H. Ferguson, for the garnishee.

No one contra.

C. P. Divisional Court.] [Mar. 10.

WELLBANKS *v.* CONGER.

Costs—Certificate for—Action for libel—Nominal damages—Cause for depriving successful party of costs.

Where in an action of libel the plaintiff obtained a verdict for twenty cents damages.

Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only.

Wilson v. *Roberts*, 11. P. R. 412, followed.

The court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict, and therefore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shown by the result of a trial of substantially the same issues before another forum, was not to be regarded.

Ritchie, Q.C., for the plaintiff.

W. H. P. Clement, for the defendant.

C. P. Divisional Court.] [Mar. 10.

In re MCLEOD *v.* EMIGH.

Prohibition — Division Court — Married woman—Examination and committal as judgment debtor—Indorsement on judgment summons.

A judgment against a married woman by virtue of the Married Woman's Property Act, creates no general personal liability, but merely charges her separate estate; and the provisions of s. 177 of the Division Courts Act, R. S. O. (1877), c. 47, as amended by 43 Vict. c. 8, touching the examination of judgment debtors,

are not applicable to a married woman against whom judgment has been obtained in the Division Court; and, even if liable to be examined such a person is not liable to be committed to gaol under s. 182.

Metropolitan L. & S. Co. v. *Mara*, 8 P. R. 355, distinguished. A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow.

Held, also, following *Reg.* v. *The Judge of the Brampton County Court*, 18 Q. B. D. 213, that the judge's endorsement on the judgment summons was the order upon such summons and that a subsequent order was illegal.

Prohibition was ordered to restrain the enforcement of a warrant for the committal of the defendant, a married woman.

A. M. Grier, for the plaintiff.

Aylesworth, for the defendant.

C. P. Divisional Court.] [Mar. 10.

FERGUSON *v.* KENNEY.

Parties—Attacking fraudulent conveyance—Assignee for creditors under 40 Vict. c. 26. (O.)—Execution creditors.

In an action to set aside a conveyance by K. to his wife as fraudulent, brought by the assignee for the benefit of creditors of K., in pursuance of the powers conferred upon such assignees by 48 Vict. c. 26, s. 7 (O.), an order was made adding certain execution creditors of K. as parties plaintiff, upon the motion of the plaintiff, who desired that the action should not be defeated if, in other litigation pending, it should be determined that the Act was *ultra vires*.

A. C. Galt, for the plaintiff.

George Kerr, for the defendant.

MacMahon, J.] [Mar. 12.

RUSSELL *v.* MACDONALD.

Discovery—Examination of witness on pending motion—Production of books.

Upon a pending motion to restrain the defendant from receiving any monies due under a certain contract, and to appoint the plaintiff receiver of such monies, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff. He was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books.

Held, that he should be ordered to attend for further examination, and to produce the books required, at his own expense.

In re Emma Silver Mining Co., L. R. 10, c. 194, followed.

H. W. Mickle, for the plaintiff.

Bain, Q.C., for the defendant.

MacMahon, J.] [Mar. 12.

GUESS *v.* PERRY.

Writ of summons—Amending indorsement—Re-serving the writ.

The writ of summons was specially indorsed with a money demand, besides which the indorsement claimed damages for waste, etc. The plaintiff obtained an *ex parte* order, amending the indorsement by striking out the claim for damages.

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5. A sells a sewing machine to B on trial with a right to return by a limited time, A making at the same time certain representations as to the prizes taken at fairs by such machines. These statements were untrue. While the machine is in B's custody it is damaged. He offers to return it within the limited time, but A refuses to accept it on account of the damage done. Who is right? Why?

6. Does a contract between two persons impose any duty on third persons? If so, what?

7. "A promise to be binding must be made in contemplation of a present or future benefit to the promisor." Discuss the proposition.

EQUITY.

Honors.

1. What declarations of trust require to be in writing? Are there any exceptions to such?

2. Is a contract obtained by fraud void, or voidable, and at whose election? Under what circumstances would the party plaintiff be

unable to succeed in having the contract set aside on the ground of fraud!

3. Define constructive fraud. Into what heads is it divided? Give an example of each.

4. A and B are trustees of an estate. The trust funds are in the hands of B, and he, against the remonstrances of A, places them in solicitors' hands for investment. The solicitors appropriate the moneys to their own uses. Is A liable? Give reasons for your answer.

5. In what respects does a "Donatio Mortis Causa" differ from a legacy and a gift "Inter Vivos" respectively?

6. A agrees to sell to B a farm. B wishes to have a written agreement drawn up, but A assures him that it is unnecessary, and that he will carry out the contract; he afterwards refuses, setting up the statute as a defence to an action for Specific Performance. Who should succeed, and why? Under what head of Equity would this case fall?

7. Discuss the application of remedial authority of Equity in cases of (1) non-execution of powers; (2) defective executions of same.

Miscellaneous.

OSGOODE HALL LIBRARY.

New additions:

Acts of the Provinces and of Canada *not* repealed by the Revised Statutes of Canada, 1887, Ottawa, 1887.
Anson on Contract, 2nd Am. from 4th Eng. ed., Chicago, 1887.
Baker on Sales, Chicago, 1887.
Bannatyne on Republican Institutions in U. S., London, 1887.
Bates on Partnership, 2 vols., Chicago, 1888.
Benjamin on Sales, by E. H. Bennett, Boston, 1888.
Berryman's Insurance Digest, Chicago, 1888.
Bigelow on Fraud, Boston, 1888.
Bispham's Principles of Equity, 4th ed., Philadelphia, 1887.
Block's Judges of England, 1837-87, London, 1887.
Bourinot's Local Government in Canada, Baltimore, 1887.
Buckley on Joint Stock Companies, 5th ed., London, 1887.
Campbell's Science of the Law, Jersey City, 1886.
Canadian Parliamentary Companion, Ottawa, 1888.
Chaster's Powers of Executive Officers, 2nd ed., London, 1887.
Cordery's Law of Solicitors, 2nd ed., London, 1888.
Crosswell's Patent Cases, Boston, 1888.
Cunningham on Elections, 3rd ed., London, 1885.
Dart on Vendors and Purchasers, 6th ed., London, 1888 (2 copies).
Davis on International Law, New York, 1887.
Dicey's Privy Council, London, 1887.
Dubreuil's Reference Book, 2nd ed., Montreal, 1888.
Elmes' Law of the Customs, Boston, 1887.
Ewell's Medical Jurisprudence, Boston, 1887.
Fawcett on Political Economy, 6th ed., London, 1884.
Fowler's Supplement to Rev. Statutes, N. Y., Albany, 1888.
Glen's Law of Public Health, 10th ed., London, 1888.
Harris on Contracts of Married Women, Albany, 1887.
Haydn's Dictionary of Dates, 18th ed., London, 1885.
Highmore's Inland Revenue Cases, 2nd ed., London, 1887.
Hoblyn's Dictionary of Medical Terms, 11th ed., London, 1887.
Jacob's Law of Domicil, Boston, 1887.
Jones (L. A.) Index to Legal Periodicals, Boston, 1888.
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Kingsford's History of Canada, Vol. 1., Toronto, 1887.
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Lawrence's 1st Comptroller Decisions U. S., 6 vols., Washington, 1881-5.
Lely and Foulkes' Licensing Acts, 3rd ed., London, 1887.
Lewis' Sheriff Court Practice, Edinburgh, 1887.
Lowndes on General Average, 4th ed., London, 1888.
Lumley's Public Health Act, 3rd ed., London, 1887.
Macdonald's Criminal Procedure (Scotland) Act, Edinburgh, 1887.
Marsden on Collisions at Sea, 2nd ed., London, 1885.
Martindale's American Law Directory, 1887-8, Chicago, 1887.
Metcalf on Contract, 2nd ed., Boston, 1888.
Mickle's General Paralysis of the Insane, 1st and 2nd eds., London, 1880-86 (Presented by Author).
Mills (H. E.) Law of Eminent Domain, 2nd ed., St. Louis, 1888.
Mills (W. T.) Science of Politics, New York, 1888.
Moore's Practical Forms, 2nd ed., London, 1887.
Morrell's Bankruptcy Digest, London, 1888.
O'Sullivan on Conveyancing (extra copies), Toronto, 1882.
Pollock on Partnership, 4th ed., London, 1888.

Pomeroy (J. N.) Riparian Rights, St. Paul, 1887.
Pomeroy (C. P.) Mercantile Law, San Francisco, 1887.
Powell's Law of Printers, Publishers, etc., London, 1887.
Pridmore on Costs, 8th ed., London, 1887.
Quebec Revised Statutes, Draft of, Parts 1 to 4, Quebec, 1883-6.
Redfield on Railways, 6th ed., 2 vols., Boston, 1888.
Revised Statutes of Ontario, Toronto, 1887 (15 copies).
Rules of Practice and Procedure for Ontario, Toronto, 1888 (12 copies).
Saunder's Criminal Offences of Young Children, London, 1887.
Scrutton's Commons and Common Fields, Cambridge, 1887.
Shaw's Law of Vaccination, 5th ed, London, 1887.
Shearwood's Guide to Final Examinations, 2nd ed, London, 1887.
Shirley's Leading Cases in Common Law, Philadelphia, 1888.
Stark's Missouri Digest, 3 vols., St. Louis, 1887.
Steer's Parish Law, 5th ed., London, 1887.
Stubbs' Constitutional History, 4th ed., 3 vols., Oxford, 1883.
Taschereau's Canada Criminal Acts, 2nd ed., Toronto, 1888.
Von Holst's Constitutional Law of U. S., Chicago, 1887.
Warner's Law of Evidence, Albany, 1887.
Waterman's Law of Corporations, 2 vols., New York, 1888.
Williams' (R. V.) Laws of Bankruptcy, 4th ed., London, 1886.
Williams (J.) Law of Real Property, 16th ed., London, 1887.
Wilson's Judicature Act, 6th ed.. London, 1887.

THE COUNTY OF YORK LAW ASSOCIATION LIBRARY.

Latest additions :

Canada, Revised Criminal Law of, Ottawa, 1887.
Churchill (C.) The Office and duties of the Sheriff, London, 1882.
Dos Passos (J. R.) The Law of Stockbrokers, Stock Exchanges, etc., New York, 1882.
Healey (C. E. H.) The Law of Joint Stock Companies, London, 1886.
Jones (L. A.) An Index to Legal Periodical Literature, Boston, 1888.
Maclachan (David) Treatise on the Law of Shipping, London, 1880.
Odgers (W. B.) The Law of Libel and Slander, Philadelphia, 1887.
Shirley (W. S.) Leading Cases in Common Law, Philadelphia, 1888.
Slater (J. H.) The Law of Copyright and Trademarks, London, 1884.
Westlake (J. I. C.) Treatise on Private International Law, London, 1880.
White (F. T.) and Tudor (O. D.) Leading Cases in Equity, 2 vols., London, 1886.
Wood (H. G.) The Law of Nuisances, Albany, 1883.
Vice-Chancellor's Reports : Dreury and Smale; De Gex and Smale; Smale and Gifford; Kay; Kay and Johnson; Johnson; Johnson and Hemming; Hemming and Miller.

AN APPROPRIATE PRESENT.—"Bigsley, the lawyer, does not seem to be very friendly to you." "No, he has shaken me off entirely." "Why is that?" "The other day I heard him making an argument before a jury, and I was so impressed by his talk that I sent him a present." "What was it?" "A set of gas fixtures."

"The typos," observes an Illinois paper, apologetically, "made us allude last week to our esteemed townsman, Mr. Polkemas, as a "villainous lounger.' We wrote 'versatile lawyer.' The error was overlooked by our proof-reader, a gentleman recently from Texas, who assures us, in exoneration of the oversight, that the two terms mean pretty much the same thing where he came from."

The following is a copy of the body of an indictment found by the grand jury of Lawrence County, Ky., at its October Term of the Criminal Court: "The grand jury of Lawrence County, in the name and by the authority of the Commonwealth of Kentucky, accuse —— of the offence of malicious mischief, committed as follows: The said ——, on the 10th day of September, A.D. 18—, in the county and circuit aforesaid, did unlawfully, wilfully and maliciously kill and destroy one pig, the personal property of George Pigg, without the consent of said Pigg, the said pig being of value to the aforesaid George Pigg. The pig thus killed weighed about twenty-five pounds, and was a mate to some other pigs that were owned by said George Pigg, which left George Pigg a pig less than he (said Pigg) had of pigs, and thus ruthlessly tore said pig from the society of George Pigg's other pigs, against the peace and dignity of the Commonwealth of Kentucky."—*Albany Law Journal.*

Law Society of Upper Canada.

HILARY TERM, 1888.

The following gentlemen were called to the Bar during Hilary Term, 1888, *viz.*:—*Feb. 6th*, —Francis Alexander Anglin, with honours, and awarded a silver medal; Francis Patrick Henry, William Howard Hurst, William Edward Sheridan Knowles, John Hood, George Ira Cochran, Edward Corrigan Emery, James Adam McLean, William Lyon Mackenzie Lindsey, John Williams Bennet, Jeffrey Ellery Hansford, Albert Edward Trow, John Henry Alfred Beattie, Thomas Hislop, Albert Edward Dixon, George William Ross, Clarence Russell Fitch, Colin Judson Atkinson. *Feb.* 7th. —Nicholas Ferrar Davidson, Arthur Edward Watts. *Feb. 11th*—Hugh Guthrie, Charles Edgar Weeks, George Smith. *Feb. 17th.*—George Nelson Weekes, Francis Ambridge Drake.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz.*:—

Nov. 22nd, 1887.—G. L. Lennox. *Feb. 6th*, 1888.—N. F. Davidson, F. A. Anglin, J. A. McLean, J. M. Mussen, A. Grant, A. E. Trow, W. W. Jones, W. L. M. Lindsey, F. A. Drake, H. Guthrie, H. A. Percival, C. R. Fitch, C. J. Atkinson, A. E. Dixon. *Feb. 7th.*—J. Hood, E. J. B. Duncan, W. J. Millican. *Feb. 11th.* —F. P. Henry, J. Carson, E. C. Emery, W. H. Wallbridge. *Feb. 17th.*—A. E. Watts, G. N. Weekes.

The following gentlemen passed the Second Intermediate Examination, *viz.*:—M. H. Ludwig, with honours and first scholarship; G. W. Littlejohn, with honours and second scholarship; W. S. McBrayne, with honours and third scholarship; and Messrs. S. H. Bradford and J. F. Gregory, with honours; E. O. Swartz, W. C. Mikel, E. E. A. Du Vernet, D. H. Chisholm, W. Pinkerton, H. B. Cronyn, O. Ritchie, E. P. McNeil, M. S. Mercer, F. B. Denton, A. E. Cole, F. Rohleder, G. D. Heyd, J. W. S. Corley, A. D. Scatcherd, A. E. Baker, A. S. Ellis, F. B. Geddes, D. A. Dunlap, C. D. Fripp, R. O. McCulloch, W. J. L. McKay.

The following gentlemen passed the First Intermediate Examination, *viz.*:—A. W. Anglin, with honours and first scholarship; J. B. Holden, with honours and second scholarship; R. E. Gemmill, with honours and third scholarship; and Messrs. J. Agnew, A. J. Armstrong, W. L. E. Marsh, D. W. Baxter, D. R. McLean, C. E. Lyons, A. F. Wilson, G. A. Cameron, W. Carnew, H. Macdonald, A. E. Slater, A. H. O'Brien, J. J. O'Meara, F. Harding, J. R. Layton, F. L. Webb, J. A. McIntosh, J. Porter, A. Crowe, F. W. Maclean, A. D. Crooks, A. Elliott, R. Barrie, W. H. Cawthra, W. Mackay, W. Yorke, J. F. Hare, D. Holmes H. Jamieson, W. Kennedy.

The following candidates were admitted as Students-at-law, *viz.*:—*Graduates*—M. Monaghan, E. G. Fitzgerald, C. J. Loewen. *Matriculants*—W. D. Earngey, J. E. O'Connor, J. C. Quinn. *Juniors*—J. Ballantyne, J. E. Varley, G. S. Morgan, J. R. Milne, D. B. Mulligan, L. Lafferty, A. J. Pepin, C. C. Fulford, P. F. Carscallen, W. H. Cairns.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m.. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 } Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. MAY 1, 1888. NO. 8.

THE rules and forms of proceedings of the Senate of Canada, touching bills of divorce and procedure thereon, prepared by the Special Committee appointed for the purpose, were adopted by the Senate on the 11th ult. A press of matter prevents our devoting space in this number to this important matter. We shall refer to it again, merely remarking at present that the country is much indebted to Senator Gowan for the intelligent labour he has given to the subject.

THE intelligence and care with which the lady who so ably discharges the duties of librarian of the County of York Law Association has, for some time past, annotated the cases in the reports under her custody with references to current decisions bearing upon them, must have attracted before now the attention of the profession. It does not require a prophet to foresee that this is daily adding so much to the value of this library, that unless the same thing is done in Osgoode Hall very soon, the profession generally will resort to the former, and not to the latter, in working up cases and opinions. The subject makes us think of a little sum in proportion: If one woman in one place can do what the lady we refer to is doing so ably and well, how many men would it be necessary to employ to secure the same being done in another place? Possibly, as Lord Dundreary would say, the answer must depend upon "how strong the other fellows are."

ARE law associations as a class more conservative in their views and actions than similar bodies composed of the members of other professions? One is tempted to suggest that, in the old world at all events, they are singularly non-progressive. Fifty law associations were applied to in January last to express their views on the problem which has for some time past given rise to so much controversy and the effusion of so much ink in England—the fusion of the legal professions. Twenty-seven sent no replies at all; fourteen thought any scheme impracticable, even if desirable; and, out of the whole number, nine only were in favour of the proposed measure. Fifty-four per cent. of the associations were either so indifferent or so contemptuous towards the scheme, as to express no opinion, favourable or adverse; twenty-eight per cent. were despondently, but contentedly, sceptical as to whether the legal world *could* move; a saving remnant of eighteen per cent. believed in fusion. If English clients are to see any great measure of law reform, tending to economy and expedition in litigation, they must obviously look elsewhere for it than to their professional advisers.

THE dilapidated condition of one of the most important abstract index books in the City Registry Office, viz., that to plan 108, has suggested to us the great propriety in our humble opinion of the Government having, at all events, the abstract index books in all the registry offices in the Province printed. It is obvious that this must be done sooner or later. As the city increases in size, and indeed already, there is a great inconvenience in only one person being able to have access to one abstract index book at a time. If they were printed there would, of course, be several copies of each abstract index book, and many people might have the same abstract index before them at the same time. Moreover, the abstract indexes to all the counties in the Province would be contained in all the registry offices in quite as little space as the present bulky volumes occupy, and people in Toronto could have before them the abstract titles of all lots of land up to, at any rate, a very late date all over the Province, and practitioners in the country would have the same advantage with regard to such properties in Toronto. Our ideas are even more extensive still, and extend to the printing of all the books in all the registry offices in the Province. The expense as a Government matter would be a trifle; the advantages would be enormous, by enabling searches into any title up to a very recent date to be made equally well in any office, excepting in respect to the occasional necessity of searching the original documents. At all events, we commend the consideration of this to the Attorney-General.

LIBEL AND SLANDER.

Hard words break no bones, though many a heart has been crushed thereby; still the law of Libel and Slander, which deals only with words, words, words, is one of the most amusing departments of jurisprudence. The appearance of Odgers on Libel and Slander in the text-book series of the Blackstone Publishing Company, has drawn our attention anew to the Queen's English, how it is used and how abused. It is wonderful to see on how many epithets the courts have passed judgment, weighing them in the scales of justice, punishing those who give currency to some, absolving those who trade in others. One may call another a scurvy, bad fellow, a rogue, a villain and a varlet, a renegade rogue, a common filcher, a cunning knave, a liar, a rogue and a swindler, a blackleg, and yet that other must bear without redress "these words of heat," unless, indeed, some special damage can be shown. One may describe an honourable member of the Law Society as a cheat, a rogue or a knave, but you must not say, "You cheat your clients." The judges allow one to call a justice of the peace a fool, ass, blockhead, a beetle-headed justice, a logger-headed, a slouch-headed, bursen-bellied hound, or a blood-sucker and one who sucketh blood; because such elegant expressions merely impute want of natural cleverness or ignorance of

law, are but general terms of abuse, and it cannot be intended what blood he sucketh.

You may say a member of Congress is weak of understanding. You may call a member of the Montreal Board of Health "a cypher," (35 A. L. J. 382). But woe betide you if you say of a bishop, "He is a wicked man," or of a parson, "He preacheth lies in the pulpit," "He is a common drunkard, a common swearer, a common liar, and hath preached false doctrines;" or of a barrister, "He is a dunce, and will get little by the law," (although Duns Scotus, the first of the great Dunce family, was "a great learned man"); or, "Thou art no lawyer; thou canst not make a lease; thou hast that degree without desert; they are fools that come to thee for law." Or even if you say any of these things, woe be to you. If you say of an attorney, "He has no more law than Master Cheyny's bull," "He has no more law than a goose," "He hath the falling sickness," "He is an ambidexter," or "a daffodowndilly" (if it is averred that the word means an ambidexter); or if you remark of a physician, "He is a quacksalver, an empiric, a mountebank." For all these words touch the person spoken of in his office, profession or trade. Distinctions are sometimes finely drawn. You must not say of a barrister, "He hath as much law as a jackanapes," yet you may say, "He has no more *wit* than a jackanapes," (wit not being essential to success at the bar). The court was not sure whether it was right to say of a solicitor, "He has no more law than the man in the moon," probably because there is some uncertainty about the amount of legal knowledge possessed by that most observant individual; and yet to say of an attorney, "He is no more a lawyer than the devil," is decidedly actionable, notwithstanding the well-known skill of the prince of liars.

You must not impute immorality or adultery to a beneficed clergyman, and yet you may to a physician or a staymaker; and if you call a woman by the vilest names, or impute to her the most immoral conduct, she has no redress unless she can prove that these words have directly caused her special damage; and discord between man and wife ending in a divorce, the husband refusing to live with his wife, her expulsion from religious societies, are not sufficient special damage. This state of the law has truly been called unsatisfactory, nay, barbarous.

In New York, it has been held libellous *per se*, to charge that a person is illegitimate (*Shilby* v. *Sun Publishing Co.*, 38 Hun. 474). In such sad cases the poor maligned woman, as she feels the sting of slander, can only comfort herself with the thought, "They are not the worst fruits on which the wasps alight."

One cannot be as free with his pen as with his tongue, for *litera scripta manet*. How it will be when the phonograph is in full swing, seizing and perpetuating all the words of a man's mouth, and allowing them to come forth again in the very tones of the first utterer at the will of any one who can turn a crank, it is for the judges on the bench to say. Meanwhile, any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonourable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disease; or which have a tendency to injure him in his office, profession, calling or trade. And so, too, are all words which hold one up to

contempt, hatred, scorn or ridicule, and which, by engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

We wot of some good specimens of slanders that Mr. Odgers passeth by. Old Brownlow gives them: *Payn* against *Mutton* gave all the justices an opportunity of deciding that an action will not lie for calling one "a sorcerer and inchantor;" "for sorcerer and inchantor are those who deal with charms or turning of books, as Virgil saith, '*Carminibus Circes, socios mutavit Ulissis*,' which is intended Charms and inchantments, and conjuration is of *con et juro*, that is, to compell the devill to appeare, as it seems to them, against his will, but which is that to which the devill appeares voluntarily, and that is a more greater offence than sorcery or inchantment, which was adjudged that action doth not lie for calling a man a witch." In the witch case, the words used were, "He is a witch, and hath bewitched me," and the court said, "he might bewitch him by fair words or fair looks." Yet in another case, where the words were, "The devil appeareth to thee every night in the likeness of a black man riding on a black horse, and thou conferrest with him, and whatsoever thou dost ask he doth give it thee, and that is the reason thou has so much money, and this I will justify." The plaintiff recovered damages. "*Sympson* against *Waters* in an action upon the case for slander, that is, thou art drunk, and I never held up my hand at the bar as thou hast done; agreed that an action does not lie for these words, for peradventure he intended buttery barr."

But to return to our text-book In considering the question of slander or no slander, what meaning the speaker intended to convey is immaterial. In construing the words, their true meaning must be held to be what the hearers understood by them, always provided the hearers are persons of ordinary intelligence, and that to ordinary English words they give their ordinary English meaning. Some words are obviously defamatory, such as "Frozen snake," "Judasa," "An itchy old toad" and "Pettifogging shyster" (as applied to a lawyer); and judges and courts have no right to be ignorant of the meaning of current phrases which every one else understands. Some words are neutral, such as technical, provincial or foreign words; then an innuendo must be given to disclose their actionable meaning. "You are a bunter;" "Thou art a clipper, and thy neck shall pay for it;" "He is a lame duck," "He is a welcher," "A blackleg," "A black sheep." With the aid of innuendos, all these seemingly innocent expressions may be actionable. Apparently, a lone Choctaw Indian or a Fiji Islander might stand all day long in our public streets, and hurl the vilest epithets his lingo contains at our best and purest citizens, and yet there would be no slander, for the bystanders must understand.

It seems innocent enough to call one "A healer of felons," "A man Friday," or to say, "He hath eaten a spider," "Ware hawk there, mind what you are about," "An honest lawyer," or to remark, "I never set any premises on fire." Yet, with a proper averment as to what the meaning was, you may be held responsible in damages for these casual expressions.

In days long gone by it was *scandalum magnatum* to say, as Mr. Proby did,

"I value my Lord Marquis of Dorchester no more than I value the dog at my feet." Even a lunatic may be held liable to an action for a libel or slander, unless his insanity is well-known to all who hear or read his words.

Mr. Odgers thinks it well that there should be a criminal remedy for libel, because most libellers are penniless, and a civil action has no terrors for them.

Our author tells us that "an Irish court will take judicial notice of the nature of a post-card, and will presume that others beside the persons to whom it is addressed will read what is written thereon." Why hold up an Irish court in this way? Why suggest that in Ireland people will look at cards addressed to others?

When a marriageable damsel brings an action for libel or slander, and tries to prove special damages, it will not do to allege that in consequence thereof she "had lost several suitors;" that is too general, for the names of her admirers, if any such there were, could hardly escape the plaintiff's memory. So it is held by judges of the male sex; how it will be when the fair daughters of the law put on the ermine, will, perhaps, soon be decided out West. When in consequence of a slander, which he did not believe, a father in New York State refused to give his daughter a silk dress and a course of lessons on the piano, which he had promised her, it was held that this was not such special damage as would sustain an action.

It would appear that an infant between seven and fourteen might be found guilty of a criminal libel, if evidence was given of a disposition prematurely wicked. A man may stumble into libel as easily as some do into poetry; a compositor will be criminally liable for setting up the type of a libel, and so will the man whose business it is merely to clap down the press. On the other hand, the proprietor of a newspaper will be held liable for an accidental slip made by his printer's man in setting up the type.

The chapter on blasphemy and heresy might almost be read on Sunday, so much is there in it on theology. Mr. Odgers' book is, indeed, most interesting; the Byronic line on his title page, "Dead scandals form good subjects for dissection," is true; and we hope that it is equally true that "Dead scandals form good subjects" for reviewing.

R. VASHON ROGERS.

THE PROVINCIAL LEGISLATION OF 1888.

THE Supplement of the *Ontario Gazette* for the 31st March last, contains the principal Acts passed at the recent session of the Provincial Legislature.

The number of Acts of general interest is somewhat less than usual, and even these are of trifling importance. Chapter 6, is an attempt to clear up the shrievalty of York muddle. We have always thought, and still think, it was a great mistake to carve out of the York shrievalty that of the city of Toronto. The affairs of the county and city are so mixed up and intermingled, that the creation of two distinct offices is tolerably sure to lead to more or less confusion. If, as was generally admitted, the emoluments of the office had become too large, it would, if it were thought desirable to have two officers to do the work, have been feasible to have appointed two sheriffs of York, giving them joint authority and an equal share of the emoluments, and an equal liability for the due performance of the duties of the office, leaving them to arrange between themselves such a division of the duties as they pleased. Such an arrangement would have, at all events, saved a great deal of trouble as regards the public. But it would have been better still, and more in the interest of the public, to have refrained from making any division of the office, or appointing any additional sheriff, and to let there be but one sheriff as formerly, and simply provided that such portion of the fees as exceeded a given amount should be applied to some public use, in a similar way to that in which the surplus fees of the registry offices are disposed of. This Act can hardly be said to simplify matters very much. It defines certain duties to be discharged by the sheriffs of York and Toronto respectively. Section 8, which relates to executions, provides that if any further portion of the county of York is annexed to the city of Toronto, the Sheriff of York is to transmit to the Sheriff of Toronto a list of all executions in his hands, and also notice of the renewal of any such writ. And that the Sheriff of Toronto, if there are no writs against a given person in his hands, is to certify that there are no executions in his office against such person, notwithstanding the name of such person may appear on the list transmitted to him by the Sheriff of York. This section seems to us likely to cause difficulty and misunderstanding. A person may be buying a parcel of land in a tract recently added to the city, and a certificate from the Sheriff of Toronto may be produced, showing that there are no executions in his hands against the vendor, while all the time there may be executions in the hands of the Sheriff of York which will bind the property. Of course, people are always supposed to know the law and to be expert lawyers, but as a matter of fact, we know this is very far from being the case. In spite of the presumption to the contrary, people will be found who will conclude that a certificate from the sheriff in whose bailiwick the land is situate, is sufficient as in other cases, and will probably find out their mistake when it is too late. The tenth section provides that unsatisfied writs in the hands of the Sheriff of York at the time of the appointment of the Sheriff of Toronto, are not to bind lands in Toronto after one year from the passing of this Act, unless before the expira-

tion of the year a writ is also placed in the hands of the Sheriff of Toronto, indorsed with a notice that priority is claimed by virtue of the Act, in which case the writ is to retain the priority it had in the hands of the Sheriff of York, unless in the meantime (we presume within the year) it has been suffered to run out, or has otherwise lost its priority in the hands of the Sheriff of York.

Chapter 9 empowers Surrogate Courts to seal foreign British probates and letters of administration, so as to give such probates or letters force in this Province. The Act is not to go into operation, however, until a day to be named by proclamation of the Lieutenant-Governor, and is only to apply to the United Kingdom and other British possessions if they pass similar Acts. Nothing is said about fees, but we presume no additional fees are intended to be payable. No provision is made for notifying the Surrogate Clerk of the re-sealing of such foreign probates or letters of administration, which appears to us an oversight which should be corrected. Provision is made for the giving of further security in cases where the security given in the foreign court is insufficient to cover the assets in this province.

It would be too much to expect that the Revised Statutes should be allowed to pass a session without being tinkered. Accordingly we have two or three Acts amending them. The amendments made by chapter 10 to the Division Court Act, R. S. O. c. 51, seem to be such as might have been reasonably refused; the amendment to section 100 appears to us to be wholly immaterial,—the words, "either before or after the issue of the summons," are inserted after the word "absconded," in the eighth line, but seem to add nothing to the effect of the section. Section 148 is amended by extending the right of appeal in Division Court cases to parties to garnishee proceedings, and parties added by order of a judge. Formerly it was a cause for committal of a defaulting debtor to gaol, if it appeared that he had contracted the debt without any reasonable expectation of being able to pay it; now the wisdom of our legislators has determined that this is not a sufficient reason for gaoling a debtor, and this provision of section 240 is struck out.

The complicated provisions of the Creditors' Relief Act, R. S. O. c. 65, also comes in for a few amendments. Chapter 11 provides that section 4 is to apply to moneys received by a sheriff as the proceeds of a sale under an interpleader order, but when the money is ordered to be paid into court, the entry required to be made by the sheriff is not to be made until the money is paid out to him again. Section 2 provides that creditors having only *fi. fas.* goods are to share ratably with all other creditors in moneys realized under *fi. fas.* lands, and creditors having only *fi. fas.* lands are also to share ratably with all other creditors in moneys realized under *fi. fas.* goods. Section 4 provides that when a sheriff is unable to satisfy a Division Court judgment or execution filed with him, upon a return thereof by the sheriff, the creditor may file it in the office of the Clerk of the Division Court where the judgment was recovered, or in the place where the cause of action arose, or the debtor, or one of the debtors (if more than one) resided, and thereupon it shall become a judgment of the said court for the unpaid balance. One would have thought that it being already a

judgment of the court in which it was recovered, it could not be made any more a judgment by the process above referred to so far as that particular court is concerned, but as regards the other places where it is authorized to be filed, the case is different, and the provision may be of some use, though perhaps not very much.

The Land Titles Act, R. S. O. c. 116, s. 53, is by the same chapter also amended, so that copies of executions are no longer to be sent by the sheriff to the Master of Titles, except upon the written request of the execution creditor or his solicitor; and The Execution Act, R. S. O. c. 64, s. 7, is also amended in a trifling particular by enabling clerks of Division Courts to certify as to executions issued by them which are entitled to be enforced, as against goods exempted from execution by the Act of last session in cases where the debt for which the judgment was recovered was contracted before 1st October, 1887.

By chapter 13, the districts of Parry Sound and Muskoka are united as a provisional judicial district, to be called "The United Provisional Judicial District of Muskoka and Parry Sound." The title is certainly long enough. A District Court and a Surrogate Court for the district are established. Sittings of the High Court are to be held once a year, or oftener, if the judges think it requisite, at Parry Sound and Bracebridge, and at such other places as may be appointed by the Lieutenant-Governor in Council. But the judges may dispense with any sitting if, on inquiry, it is found to be unnecessary.

The Local Registrar of the High Court for the united district is to be located at Parry Sound, and this official is also to be the Clerk of the District Court and Surrogate Court. There is also to be a Deputy Clerk at Bracebridge, but the Act appears to confine the powers of the Deputy to proceedings in the District and Surrogate Courts, and he does not appear to have any jurisdiction in the High Court.

By chapter 14, a temporary judicial district is created by the setting apart of the great Manitoulin Island and adjacent islands as a separate district, but no separate courts are established for this new district, but provision is made for the appointment of a Deputy Clerk for Manitoulin of the District Court of Algoma.

Chapter 15 abolishes the right of a mortgagee to claim six months' notice, or six months' interest in lieu of notice, from a mortgagor coming to redeem after the day appointed for payment; but express contracts providing for such notice, or payment of interest in lieu thereof, are to be still valid and binding. And the Act is not to apply so as to enable a mortgagor to pay off the mortgage when the principal has become due, merely by reason of default in payment of interest or an instalment of principal, and it is not to apply to mortgages made prior to 1st July next. By this Act some further amendments are made to the Revised Statutes. The right of a mortgagee to sell under the statutory powers conferred by R. S. O. c. 102, upon default in payment of his mortgage, were limited to cases where principal or interest were six months in arrears; now the Act is amended so that these powers may be exercised when the principal is four months or the interest six months in arrear. These statutory powers may also be exercised where the short form mortgage is used subject to certain restrictions.

Section 5 deals with powers of sale exercised by assignees of mortgagees, and imposes a limitation for bringing actions brought to impeach such sales on the ground that the assignee was not authorized to exercise the power to a period of two years from the date of sale. This provision is no doubt introduced in consequence of the decision in *re Gilchrist and Island*, 11 O. R. 587.

Chapter 16 makes provision for payment to the Accountant of the Supreme Court of Judicature of unclaimed moneys remaining in the hands of real representatives in partition actions. Chapter 16 makes certain amendments to the Registry Act. Section 1 provides that powers of attorney to sell land in which the commission of the attorney is made a charge on the land are to be of no effect as against subsequent purchasers, or the creditors of the donor, after the lapse of one year from the date of the instrument, if made after the Act, or one year from the passing of the Act when it was made before. This period is, we think, too short, at least so far as farm lands are concerned. We shall expect an amendment to this next session. The second section requires that any instrument charging lands with the payment of the price of goods shall not be registered without an affidavit proving that it has been read over and explained to the person executing it, and that he appeared to understand it, and was informed that it might be registered as an incumbrance on his land. A form of certificate of discharge of such instruments is also provided. Letters of administration affecting lands may, by section 5, be registered as probates of wills are registered.

Chapter 20 refers to the marriage law, which we have not space to refer to at length.

By chapter 21 the married woman comes in for her annual share of attention. Provision is made for enabling a judge to dispense with a husband's execution of a conveyance of land in which he has curtesy, when he is a lunatic, idiot, or of unsound mind, or is, from any other cause, incapable of executing a deed; or if his residence is unknown, or he is in prison, or is living apart from his wife by consent, or under circumstances which entitle her to alimony, or if he has deserted her, or if, in the opinion of a judge, there is any other cause for so doing, so as to enable the wife alone to convey the land free from her husband's estate. The framers of this Act, as if to show that they are not themselves quite convinced of its necessity, conclude with a clause that nothing in the Act shall be taken or construed as meaning or implying that a married woman may not, without and irrespective of its provisions, validly make a conveyance of her real estate as if she were a *femme sole*.

By chapter 23 provision is made for wives deserted by their husbands obtaining summary orders against their husbands for their maintenance, to the extent of a sum not exceeding $5 per week.

Chapter 125 is passed to cure a defect we pointed out in an Act passed the previous session (see *ante*, vol. 23, p. 225), and is an instance of the want of care too often displayed in the drafting of our Provincial Acts.

The Legislature, by an Act to regulate the closing of shops and the hours of labor therein of children and young persons, has gone, perhaps, as far as was possible. Like many other well-intentioned Acts of the sort, however, we fear it will be, to some extent, a dead letter.

In commenting, in former years, on the course of legislation in this Province, we have ventured to suggest that we pay somewhat dearly for our annual Statute Books, and we are inclined to think this year's volume will not be considered by any unprejudiced person to be any more worth its cost than its predecessors. Which of our politicians will have the moral courage and the personal disinterestedness to propose biennial sessions for legislation in lieu of the present extravagant annual sessions?

Reviews and Notices of Books.

A Legal Hand-Book and Law List for the Dominion of Canada, and a Book of Parliamentary and General Information. By LOUIS H. TACHE, Advocate. Toronto: Carswell & Co. 1888.

The editor states that his aim has been to present, in a concise and useful form, a variety of legal, parliamentary, and general information, together with a complete law list for the Dominion, the whole being compiled from the latest official and other authoritative sources. The amount of useful general information, much of which is of legal or semi-legal character, contained within the limits of this volume, is so great as to make it a valuable addition to the list of books of reference which lawyers have come to look upon as indispensable. Its contents are so varied, that it is difficult to give a complete view of the ground covered. We may, however, notice a few of the topics treated of. We find a list of the parliaments of the United Kingdom, extending back to the beginning of the present century, the date when each assembled and was dissolved, also the administrations, in Britain during the century. There is a list of all the British, foreign, and colonial possessions, the area of each, its population and chief executive officers, and also a list of the British and foreign ambassadors. The portion of the book dealing with Dominion public matters comprises some 117 pages, and includes such various topics as the jurisdiction of the Supreme Court, its sittings, officers, fees, etc.; the Queen's counsel for the Dominion, revising officers, a list of the law reports of the different provinces, etc. Then each province of Canada is separately dealt with. The governors since confederation, the members of the Cabinet and Legislature, the officers of the Government, the Law Society, the courts and judges, local and County Court officers, registrars of deeds and their fees, registration divisions, barristers and solicitors and their residences, police magistrates, Division Court districts, clerks and bailiffs; the commissioners in other provinces for taking affidavits to be used in Ontario, and those in Ontario for taking affidavits in the other provinces, include most of the lists for Ontario. There is, besides, a synopsis of commercial law, the law of descent, etc. The other provinces of Canada are similarly dealt with. The indexes are full, being arranged both by topics and names. The book is an evidence of much patient industry, judiciously applied.

Notes on Exchanges and Legal Scrap Book.

THE CANADIAN CONSTITUTION.—The *Law Quarterly Review* for March gives nineteen pages to an article on this subject, by Mr. J. E. C. Munro, which is to be a portion of a forthcoming work on "The Canadian Constitution." After glancing at the area and population of each of the constituent units of the Dominion, and briefly tracing the history of confederation, the writer enumerates the sources from which the student must gather his information concerning the Canadian Constitution. In addition to the B. N. A. Act, there are (1) English Statute Law; (2) Canadian Statute Law; (3) Provincial Statutes; (4) Imperial Orders-in-Council, of which the most important are those admitting British Columbia, Prince Edward Island, and the North-West Territories into the Union; (5) Dominion and Provincial Orders-in-Council; (6) Orders and Rules of the Dominion Parliament and Provincial Legislatures; (7) Usage. The distribution of legislative power is treated somewhat fully, references being made to the B. N. A. Act, to the cases decided under it, and to various other authorities. An attempt is made at a classification of the various powers of the Dominion Parliament and the Provincial Legislatures, and they are grouped under seventeen heads. Each of these is then enlarged upon. The control of the Provinces by the Dominion, including the vexed question of the veto power, and Imperial control over Canada, are the concluding topics of the paper.

LIABILITY OF INN-KEEPERS.—The responsibility of the proprietor of the inn or tavern for injury inflicted on one guest by another guest, who has been allowed to remain on the premises in a state of intoxication, was at issue in *Rommel* v. *Schambocher*, lately before the Supreme Court of Pennsylvania. We condense the facts from the report in the *American Law Register*. The plaintiff, a minor, entered the tavern of the defendant, and there found one E. F. They both became intoxicated on liquor furnished them by the defendant. While the plaintiff was engaged in conversation with the defendant, E. F. pinned a piece of paper to the plaintiff's back, and set it on fire, whereby the plaintiff was severely injured. The appeal to the Supreme Court of the State was from a decision that the facts were not sufficient to sustain a claim for damages against the tavern-keeper. This decision was reversed by the Supreme Court. The defendant did see, or might easily have seen, all that was going on. When one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the insults or assaults, as well of those whom he employs, as of the drunken and vicious men whom he may choose to harbour. *The Pittsburg and Connellsville Railroad Company* v. *Pillow* was cited and followed. In that case a drunken row occurred in a railway car, a bottle was broken in a quarrel, and a piece of the glass struck a peaceful passenger in the eye, and put it out. The company were held responsible. Drunken

LEGAL EDUCATION IN THE UNITED STATES.—*The American Law Register* has given its views lately on the subject of legal education. As the topic is one of considerable interest to us at the present time, it may not be inopportune to look at the views expressed by contemporaries in regard to the lessons to be learned from the experience of our neighbours. The *Law Register* bewails the decadence of legal education, and asserts that the former days were better than these. The American demon of hurry has infected the legal profession, and every other calling too, and now the result is the admission to the bar of men scantily prepared for the work of their profession, and, in many cases, not even so sufficiently equipped as to be able to acquire that learning which is in many cases postponed until studentship is ended. The long apprenticeship of the Inns in England, the discipline of pleading under the bar before call, the preceptorship of a member of the bar of the old school, the thorough knowledge of the legal classics made necessary by the length of time required for the course, are in marked contrast to the superficiality engendered by a course of but two years in the study of law, with no sufficient training as a guarantee of proper mental power or equipment for the task.

The old American system, before the law school had practically the monopoly of legal education, in which the centre of instruction was the office of the practising attorney, is pictured in glowing colours. With us in Canada a similar system, or rather lack of system, means that the student is left to his own resources for instruction, for guidance in his reading, for help in his difficulties; he gropes in the dark along a labyrinthine path, where the help of a skilful guide would save many a needless step, and deliver him from many a pitfall.

Many of the evils which our contemporary deplores are traceable to the law schools, or, perhaps, more accurately, to defects in the law schools, which have rendered them quite as powerless to stem the flood of evils that haste and unrest have brought upon the standard of legal knowledge, as was the former system of blind groping. To remedy these defects is the duty of the hour. They are chiefly two. In the first place, no means are provided to insure that the student who attends the lectures given in the law schools is capable of comprehending them. He has no knowledge of legal principles, he is without even the foundation of a good academic or collegiate education. Next, the time given to study is so short; no one could possibly acquire a respectable knowledge of even the elements of law within the limits of the sixteen months of instruction, which is the full time of most of the courses of the law schools. The examinations are conducted by the professors, and follow the ruts in which the lecturers have travelled.

The remedy must come, in the opinion of the journal whose views we are examining, from two sources. These are the law schools and the courts. The courts, in whose hands the control of admission to practice rests, are urged to lengthen the time of study, whether in the law school or in the office, to at least three years. Then the character of the examinations, preliminary and final, must be changed in the direction of greater difficulty. So raise the standard of attainment requisite for admission, that none but thoroughly fit men shall be per-

mitted to practise law, and let it be such that to attain to it will be an assurance to the public of the competency, intellectually and morally, of the man who has reached it, to take charge of the interests of his clients.

The *Central Law Journal* dwells on the necessity of mental training apart from, and additional to, legal knowledge. In its view the liberality of the previous education is of first importance. Those mental gymnastics which develop perception, ratiocination and memory are a source of mental power. The student should have a sufficiently long previous experience of study to know how to study. His career as a lawyer will involve the constant acquisition of knowledge. His education should fit him for making those acquisitions.

Our western contemporary concludes, by giving utterance to its gratification that the legal education in law schools has so completely superseded the systemless reading of law in a lawyer's office, once so prevalent. It is one of the most notable of the miracles of the profession, in its opinion, that so many men who attained eminence at the bar and on the bench, began in such unfavourable circumstances.

Correspondence.

THE LAW SOCIETY AND ITS DUTIES.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—During the last two weeks a number of articles and letters referring to the Law Society have appeared in one of the daily papers, which ought not to pass unchallenged. Without discussing the motives which have actuated the writer, and which may be read between the lines, in his unscrupulous attack, it may safely be said that these letters and articles are apparently intended to injure the Society, and place it in a false and unfavourable position before the public. The impression intended to be conveyed is that the Society is in receipt of large sums of public money for educational purposes, which it diverts to other uses, and that it expends a nominal sum only in educating students, for the purpose only of escaping taxation. I think it is only fair to correct the wrong impressions thus created, and to show that the Law Society, so far as the means at its command will allow, is doing good work.

In the first place, the Law Society is not in receipt of any public money whatever. The Society purchased its land, built the building occupied by itself, purchased its library, and maintains building, grounds and library, entirely with its own money, not receiving or expending one cent of public funds. It pays all its expenses, including examiners and lecturers, with its own money, publishes the Reports of all the Courts with its own money, and supplies not only

all the judges, both of the Supreme Courts and County Courts, with them, free of charge, but the whole of the profession who pay their fees also.

The writer of the letters and articles referred to, attempted to show that half the income of the Society was derived from the students. He strives to attain this end by including in this estimate, not only the preliminary entrance fees, the intermediate fees, and the notice fees, which are the only fees paid by students, but also the fees that are paid at the call to the bar of barristers, and at the admission to practice of solicitors, which are not collected by the Society until the period of studentship is over, and that of the full-fledged barrister and solicitor begins. Of the sum paid in 1887 by students, more than five-sevenths was expended directly in legal education, in paying examiners and lecturers, in medals and scholarships, stationery and printing. In addition to this, the students had the free use of the Law Society Library to the same extent that the barristers and solicitors had; they had the privilege of borrowing every book mentioned in the curriculum for two months, and taking these books to their homes, simply being required to deposit temporarily the sum of ten dollars as security for their due return, and they had the free use of the large examination hall of the building, as often as they required it, for their public and private debates—it being heated and lighted at the expense of the Law Society. By this it will appear that the law students have not been treated so badly as their self-appointed champion would desire should appear.

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The best proof that the legal education of the students is not neglected is the fact that every judge on the bench obtained his preliminary training as a student of the Law Society; that many of the leading counsel in Ontario have distinguished themselves in the argument of most important cases before the Judicial Committee of the House of Lords, and in so doing have compared most favourably with the leading counsel of England; Canadian law students have distinguished themselves in the United States; notably so John D. Lawson, the author of several text-books of repute, on Presumptive Evidence, on Carriers, and other subjects, and that some of the leading members of the Ontario Bar hold the most important positions in the Government, not only of the Province, but of the Dominion. These facts speak for themselves, and prove that the practical training obtained by Ontario Law students produces men on the bench and at the bar who are an honour to the Province of Ontario and to the Law Society of Upper Canada.

FIAT JUSTITIA.

Toronto, April 24th, 1888.

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Another plan would be to direct that the lectures delivered in Toronto be printed and distributed free to all students; to make the attendance at the lectures compulsory to Toronto students only, and to allow all students to compete at the examinations on the lectures and win the scholarships if they can. So much for legal education.

The Society, all must admit, has done excellent work in collecting at Osgoode Hall, at great expense, the best law library in the Dominion, which is used to an enormous extent by the judges, barristers, solicitors, and last, but not least, by the students. It has established branch libraries in twelve of the county towns, including the Court House library at Toronto. It has also compiled, published and distributed to the judges, and profession generally, all the reports of all the superior courts of the Province. It compiles and publishes, every three years, a digest of all the reports, and publishes early notes of all the cases fortnightly in THE CANADA LAW JOURNAL and *Canadian Law Times.*

The best proof that the legal education of the students is not neglected is the fact that every judge on the bench obtained his preliminary training as a student of the Law Society; that many of the leading counsel in Ontario have distinguished themselves in the argument of most important cases before the Judicial Committee of the House of Lords, and in so doing have compared most favourably with the leading counsel of England; Canadian law students have distinguished themselves in the United States; notably so John D. Lawson, the author of several text-books of repute, on Presumptive Evidence, on Carriers, and other subjects, and that some of the leading members of the Ontario Bar hold the most important positions in the Government, not only of the Province, but of the Dominion. These facts speak for themselves, and prove that the practical training obtained by Ontario Law students produces men on the bench and at the bar who are an honour to the Province of Ontario and to the Law Society of Upper Canada.

FIAT JUSTITIA.

Toronto, April 24th, 1888.

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

Report of Special Meeting of Trustees, called to consider the establishment of the proposed Law Faculty, the creation of a permanent Circuit List, etc.

Present, all the Trustees. Mr. E. Martin, Q.C., in the chair.

The proposal to establish a Law Faculty was first taken up. After careful consideration it was

Resolved,—First, that, in the opinion of the Hamilton Law Association, the scheme for the establishment and maintenance of a Law Faculty, published by the Joint Committee of the Law Society and Senate of the University, cannot be carried out until the first and second sections of chapter 146 R. S. O. are repealed, and hence that it is premature to discuss in detail the merits of the scheme. At the same time the Association desire to express generally their disapproval of the scheme. Second, that this Association is of opinion that, with the view of improving the present standard of legal education, provision should be made by the Law Society for the delivery of a coure of lectures at Toronto and other centres throughout the Province, and the compulsory attendance of students thereat, and also that students for call to the bar should be required to serve under articles in the same manner as students for admission.

The creation of a permanent Circuit List and the circular of the Joint Committee of Law Associations, dated 21st March, 1888, were then considered, and it was

Resolved,—First, that this Association approve of the establishment of a permanent Circuit List for the trial of all actions in the High Court, and, so far as Hamilton is concerned, for the arrangement proposed in the circular of the Joint Committee of Law Associations dated 21st March, 1888, provided that a jury be summoned for the January sittings. Second, that this Association approve of the settlement definitely before a case is called for trial whether it is to be tried with or without a jury, as stated in the said circular.

These resolutions received the unanimous approval of all the Trustees.

DIARY FOR MAY.

1. Tues ...Supreme Court sittings. St. Philip and St. James.
2. Wed....Sup. Ct. of Can. sits. J. A. Boyd, 4th Chan., 1881.
6. Sun.....*5th Sunday after Easter.*
7. Mon....Lord Brougham died, 1868, æt 90.
8. Tues....Ct. of App. sits. Gen. Ses. and C. C. sit. for trials in York. 1st Inter. Exam.
10. Thur. ..2nd Inter. Exam. Ascension Day.
13. Sun.....*1st Sunday after Ascension.*
15. Tues ...Solicitors' Examination.
16. Wed....Barristers' Examination.
20. Sun.....*Whitsunday.*
21. Mon ...L. S. Easter Term begins. H. C. J. sit. begin. Confederation proclaimed, 1867. Lord Lyndhurst born, 1772.
24. Thur. ..Queen Victoria born, 1819.
25. Fri. ....Princess Helena born, 1846.
27. Sun.....*Trinity Sunday.*
28. Mon....Battle of Fort George, 1813.
31. Thur. ..Parliament of U. C. first met at Toronto, 1797.

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

FIRST DIVISION COURT, COUNTY OF WENTWORTH.

FOSTER *v.* THOMAS AND C. J. MYLES.

Tariff of fees—Claim under $20—What fees clerk and bailiff entitled to.

[SINCLAIR, Co. J.—Hamilton, April 3.

Judgment was entered for the plaintiff for $6.00 and costs. A detailed bill of these costs, as set out below, was rendered by the clerk to the solicitors of the defendant, who thereupon applied to the judge for a review of the clerk's taxation, under s. 46 of the Division Courts Act. The following is the detailed statement of the costs:

1. Receiving and entering claim	$0 15
2. Summons	0 40
3. Two copies summons	0 40
4. Entering bailiff's return to summons served	0 15
5. Affidavit of service	0 25
6. Filing defence	0 25
7. Notice to plaintiff, and postage 5c.	0 20
8. Taxation of costs	0 25
9. Adjournment from Jan'y 6th to Feb'y 15th	0 25
10. Three notices, 45c.; and postages to plaintiff and defendants, 15c.	0 60
11. Subpœna, 15c., and four copies, 20c., to plaintiff	0 35
12. Entering bailiff's return of service of subpœna	$0 15
13. Affidavit of service	0 25
14. Adjournment by judge's order from Feb'y 15th to Feb'y 16th	0 25
15. Adjournment from Feb'y 16th to Feb'y 24th	0 25
16. Feb'y 24th, transmitting papers to Deputy Judge Nesbitt	0 25
17. Postage	0 05
18. Entering judgment	0 50
19. Notices to plaintiff and defendant, 30c.; and postage, 10c.	0 40
20. Filing affidavit of disbursements	0 25
21. Affidavit	0 25
22. Notice to defendant and postage, 5c. (of disbursements)	0 20

BAILIFF'S FEES.

23. Service of summons (2) defendants	0 37
24. Service of subpœna	1 23
25. Calling parties at court (twice).	0 30
26. Execution ordered by plaintiff and held by request of defendants	0 50
27. March 28th, transmitting papers to judge, 25c.; postage, 5c.	0 30
	$9 25

The following is the judgment on the revision of the taxation by

SINCLAIR, Co. J.:—The 304th sec. of the Division Courts Act declares, that nothing in the Division Courts Act "Shall be held to authorize the taxation or allowance of costs *to any officer* of the court other than those to be found in the tariff of fees as authorized and allowed," etc.

I have, therefore, to take the tariff as the clerk's guide as to his proper fees, and if not there allowed or mentioned, any item, no matter how honestly work is done, or done in most perfect good faith, is not taxable against the unsuccessful party. The defendant is only compelled to pay that which the tariff allows, and no more.

The above bill is that rendered by the clerk to the defendant, showing in detail the costs taxed against him by the clerk.

The first item objected to is No. 10—"three notices, 45c., and postages, 15c., to plaintiff and defendants," in all 60c. The claim was entered against a firm as such, but, for some

reason unexplained, the names of the individual partners were inserted in the summons. In garnishment proceedings the firm could not be garnished in its partnership name: *Walker* v. *Rooke*, 6 Q. B. D. 631, but under s. 108, ss. 4, of the Division Courts Act, this action certainly could be brought against the firm. However, as no objection was made to the suit against the individual members of the firm, it cannot be made now. But a clerk is only allowed to tax costs for what he does, and the charge, therefore, must be allowed by the tariff. In this case the defence was put in by a well-known firm of solictors. Notice was admitted to have been given to them, and to the plaintiff or his solicitor. This was the proper way of giving notice of the adjournment (if necessary to give notice at all), and as only two notices were given, three notices cannot properly be taxed. The sum of 15c. must come off this item.

Item 11 is incorrect, and must not be charged against the defendant, for reasons which will hereafter be given as to the disallowance of some of the witness' fees—the plaintiff must bear these himself—35c. is struck off.

Item 12—"Entering bailiff's return of service of subpœna, 25c.," is admittedly wrong, and must be disallowed.

Item 13—"Affidavit of service" of subpœna, I suppose is correct, because that would apply and be necessary in the case of witness or witnesses properly allowed.

Item 14—Adjournment from Feb'y 15th to Feb'y 16th. The facts are that the business of the court was not through on the 15th, and *the court* was adjourned until next day. The charge for this cannot be made under the tariff. The only item in the clerk's tariff of fees under which it is contended the charge is right is the 17th, it says: "Every order of reference or order for adjournment made at hearing, and every order requiring the signature of the judge and entering the same, 25c." There was no adjournment of the cause; it only stood over until the next day, because it could not be tried on the first day of the sittings. In such cases there cannot be any charge made by the clerk. If *a cause* is adjourned from one sitting to another, the charge is proper, but not if the court is adjourned. This item 25c. taxed against the defendants must come off.

The next charge objected to, is an adjournment so-called from the day of hearing, the 16th of February, until the 24th of the same month. The fact is that the deputy judge took eight days to consider his judgment under s. 144 of the Division Courts Act. While the judge is taking time to consider a case and has reserved his decision, there cannot and is not an adjournment of the cause.

This item is not taxable, and must be deducted. It amounts to 25c.

It is objected that item 16 should not be allowed, for transmitting papers to the judge "on application to him." As a general thing in cases in town papers are left with the clerk when judgment is reserved, and by him handed to the judge afterwards. I do not think that item 23 of the tariff covers it. It is an obligement to the judge, but cannot be considered "Transmitting papers to judge on application to him." Should they be transmitted for the purpose of any pending application it would be allowable. As quarter is neither asked nor allowed in this case, I must decide that the 25c. must be disallowed.

Under any circumstances the tariff does not disallow necessary postage. The 17th item, 5c. postage, must therefore remain.

The next item objected to is the 19th on the annexed bill (the item preceding it is "Entering judgment, 50c.," which is not objected to), and this is "Notices to plaintiff and defendant, 30c., and postages, 10c.—40c. It may be a matter of kindness for the clerk to notify the unsuccessful party of the amount of his liability, but there is no item in the tariff for the allowance of anything for it. There is no law *requiring* it to be done. It is simply a *voluntary* act, which cannot create a legal liability.

It is contended by the clerk that the 21st item, "Filing affidavit of disbursements, 25c.," is allowable under item 7 of the tariff. That item is in these words, "Entering and noting every defence or notice of admission in procedure book, 25c." The meaning, if there were doubt, is to be found in the remaining part of that item; it is in these words, "To be paid in the first instance by the defendant or other person entering it, but it may be afterwards taxed against the plaintiff, should costs be given against him." It will thus be seen that it is quite clear the item does not refer to an affidavit of disbursements filed by the plaintiff, but to a "defence or notice of admission," which could only be filed by the defendant.

It also provides that although the defendant may have to pay it in the first instance, yet he gets reimbursed the sum in the event of his succeeding. This item, 25c., is clearly not allowable.

The next item, 21 in the bill, is more difficult to decide. The 9th item of the clerk's tariff, under which it is claimed, is in these words: "Every necessary affidavit, if *actually prepared* by the clerk, and administering oath to the defendant, 25c." The affidavit of disbursements was not actually prepared by the clerk of the court, but by one of the solicitors for the plaintiff. I do not see any reason why the charge is not allowable, no matter by whom prepared, but I cannot disregard the plain and imperative language of the tariff. I have already expressed my views on this item (Sinclair's D. C. Act, 1886, pp. 107 and 108), and I see no reason to change them. The affidavit purports to have been prepared by some other than the clerk, and it is for him to show that it was so prepared with his authority and for him: *Myles* v. *Thompson*, 23 U. C. R., at pp. 554-555. I will not strike this item off now, but will allow one week for a necessary affidavit of the fact to be filed, consistently with the views I have heretofore expressed, but if such is not done I see no ground upon which it can be allowed. The words "actually prepared by the clerk," must have been intended to limit the allowance of the item to the circumstances mentioned: *Jackson* v. *Kassel*, 26 U. C. R. 341; *Northcote* v. *Brunker*, 14 App. R. p. 378.

The next item, No. 22, is "Notice to defendant and postage, 5c. (of disbursements) 20c." There is no notice of taxation in the Division Court, nothing to give the unsuccessful party an opportunity of being heard in opposition to the taxation. If there had been I would (if the party had attended in pursuance of it), have gone a long way to try and find some means of allowing compensation for it. But nothing of the kind has been done here. The costs are taxed *ex parte*, and then the defendant is informed by letter or formal notice, if you will, of the amount of them. This may be courteous on the part of the clerk, but the tariff precludes any charge for it. The kindness may be requited in some other way, but not by any allowance under the tariff. The sum of 20c. must come off this item.

There are only two items remaining of the clerk's fees that are objected to. The first is No. 26, "Execution ordered by plaintiff and held by request of defendants, 50c.," and the other of 28th March (in pencil), in these words, "Transmitting papers to judge, 25c., postage 5c.—30c.

In regard to the first item it appears that the solicitors on both sides agreed for a stay of execution, as the defendants are well-known business men, and I suppose did not want execution issued against them, and the plaintiff well knew he would have no difficulty in making his money, when the amount of debt and costs was ascertained. But to make an arrangement or understanding of the parties a groundwork of this charge is to my mind entirely unwarranted by any authority I know of. If the clerk had received authority to issue execution it was countermanded by the plaintiff, and if he was not instructed to do so either expressly or otherwise he could not do so of his own mere motion. This would be converting the clerk of the court into the plaintiff in every suit entered in his court. On this point I refer to the words of GALT, J., in *Ross* v. *McLay*, 26 C. P. at p. 199, who says: "It is sufficient to say that he (the officer) has charged the plaintiff for services which he did not render, and therefore the charge must be disallowed."

As to the last item, I am of opinion that it cannot be allowed where the defendants have succeeded on their appeal. The clerk should bear it himself, and it must be struck off too.

Now as to the bailiff's costs.

I disallow the expenses of serving the subpœna on George Roach, John Roach, Captain Armstrong, and Captain Zealand. They must come off. They were subpœnaed to disprove a counter-claim, which was not part of the record. The plaintiff opposed the allowance of this counter-claim to be added, and succeeded in having its allowance rejected at the trial, and now asks for attendance of his witnesses brought to disprove the anticipated defence. The plaintiff cannot take this anomalous position. The amount of the bailiff's expenses for serving the four witnesses named, and $3.00 allowed for their witness fees, cannot be charged the defendants. The amounts must be struck off. This is not intended to exonerate the plaintiff from such costs as he has voluntarily incurred to the clerk, but are not chargeable to the defendants, according to my opinion.

I have gone into the questions here presented further than I otherwise would, were it not that I want to settle for the future, at least in this county, the charges discussed in this opinion, and render it unnecessary again to consider them. I trust there will be no necessity for it, in view of s. 278 of the Division Courts Act, and of what is right.

Should the clerk have any difficulty, or should there be any doubt in arriving at the proper sum, I will decide it according to this opinion. I have not such papers before me as enable me to decide this question at the present moment. I must impress upon clerks and bailiffs the necessity of seeking in the clerks' and bailiffs' tariffs only the authority for making charges for services under the Division Courts Act. There are many things which a clerk does, and which he is compelled to do, for which a fee should be, but is not, allowed. He is not alone in that respect. A judge of a County Court in Ontario can readily sympathize with him; but so long as a public position is occupied, the incumbent must bear the consequences of such, whatever they may be under the law.

No objection was taken to the affidavit of disbursements, which might have been as contrary to D. C. R. 133. The practice in that respect, established by the O. J. Act, does not apply to Division Courts, *Clarke* v. *Macdonald*, 4 O. R. 310; *Bank of Ottawa* v. *McLaughlin*, 8 App. R. 543.

The item of calling witnesses twice cannot be allowed the bailiff. He is only entitled on the facts here to calling once, and 15c. must be struck off.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[Mar. 15.

CLARK *v.* ODETTE, THE "MARION TELLER."

Salvage—Special contract—Action by agent of owners.

The "Marion Teller" was aground near the shore of Lake Erie, and was towed off by a tug. The plaintiffs, who managed the tug on commission, sued in their own names for remuneration for such salvage services, and the Maritime Court awarded them $1,110.00, finding that there was a special contract made by which the master of the rescued vessel agreed to pay $10.00 an hour for such services.

Held, reversing the judgment of the Maritime Court, that the plaintiffs being neither owners of, nor mariners, nor passengers on board of the tug, could not sue in their own names for such salvage.

Appeal allowed with costs.

R. Gregory Cox, for appellants.

[Mar. 15.

CANADA ATLANTIC RAILWAY CO. *v.* MOXLEY.

Railway company—Sparks from engine—Lapse of time before discovery of fire—Presumption as to cause of fire—Defective engine—Negligence.

A train of the Canada Atlantic Railway Co. passed the plaintiff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed, it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered, and destroyed a quantity of the standing wood and timber on said land.

In an action against the company, it was shown that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous.

Held, affirming the judgment of the Court of Appeal (14 Ont. App. Rep. 309), that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed.

Appeal dismissed with costs.

Chrysler, for the appellants.

McCarthy, Q.C., and *Mahon*, for the respondents.

[Mar. 15.

SEYMOUR *v.* LYNCH.

Written instrument—Construction of—Lease or license—Authority to work mine.

In an indenture, describing the parties as lessor and lessees respectively, the granting part was as follows: "Doth give, grant, demise and lease unto the said (lessees) the exclusive right, liberty and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land), and with agents, labourers, and teams, to search for, dig, excavate, mine and carry away the iron ores in, upon, or under said premises, and of making all necessary roads, etc.; also, the right, liberty and privilege to erect on the said premises, the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in running said ores." There was a covenant by the grantees not to do unnecessary damage, and a provision for taking away the erections made, and for the use of timber on the premises, and such use of the surface as might be needed.

The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes, and not to allow intoxicating drinks to be manufactured on the premises or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term, and a covenant by the lessor for quiet enjoyment.

In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent, due under the said indenture, by virtue of 8 Anne, c. 14, s. 1,

Held, per RITCHIE, C.J., and HENRY and TASCHEREAU, JJ., that this instrument was not a lease, but a mere license to the grantees to mine and ship the iron ores, and the grantor had no lien for rent under the statute. STRONG, FOURNIER, and GWYNNE, JJ., contra.

The court being equally divided, the appeal was dismissed without costs.

Northrup, for the appellants.

Chute, for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

BEATTY *v.* SHAW *et al.*

Mortgage—Executor and trustee—Void discharge of mortgage—Payment for Improvements—Mistake of title.

H. by his will appointed F. and W. executors and trustees of his estate. F., for the purpose of securing a debt due by him to the estate, executed a mortgage to W. W. died intestate, and F., five years subsequently, having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, which he expressed to do as sole surviving executor, and conveyed the estate to M.

Held, affirming the judgment of BOYD, C., 13 O. R. 21, that the act of F. in executing such discharge, had not the effect of releasing the land from the mortgage.

Held, also, in this reversing the judgment, that M., the purchaser from F. and his assigns, were not entitled to any lien for improvements on the lands during their occupancy thereof.

J. C. Hamilton and *Alan Cassels*, for the appellant.

Bain, Q.C., for the respondents.

LONDON AND CANADIAN LOAN COMPANY *v.* MORPHY *et al.*

Stock exchange—Sale under process of seat at —Sequestration.

The plaintiffs had recovered judgment against the defendants, M. & N., both of whom were members of the Toronto Stock Exchange, each owning a seat at the board thereof. The seats at that board it was considered could not be sold under *fi. fa.*, and an application was made to the Queen's Bench Division for an order to sell the seats which had been seized under a sequestration, which was refused by WILSON, C.J., whereupon the plaintiffs appealed; and on the argument it was made to appear that M. had paid off the judgment of the plaintiffs, and was carrying on the appeal for the purpose of obtaining the seat owned by N. This court, under the circumstances, and aside from the fact that the ultimate com-

pletion of title to a purchaser could only be effected by the contingent co-operation and assent of the Stock Exchange, as provided by its by-laws, affirmed the judgment appealed from without prejudice to any right M. might have to procure himself to be substituted for the plaintiffs.

Arnoldi, for the appellants.

C. Ritchie, Q.C., for the Toronto Stock Exchange.

Mortimer Clark, for respondent Niven.

MOORE *v.* THE CITIZENS' FIRE INSURANCE CO.

MOORE *v.* THE QUEBEC FIRE INSURANCE CO.

MOORE *v.* THE BRITISH AMERICA ASSURANCE CO.

AND

MOORE *v.* THE GORE DISTRICT MUTUAL FIRE INSURANCE CO.

Fire insurance—Over-value—First statutory condition — Several insurances — Change of one policy—Notice.

The plaintiff being owner of a quantity of railway ties and lumber, effected insurances thereon with three companies to the amount of $4,000, and subsequently, with the knowledge and through the agency of H., the person acting on behalf of the several companies, effected an additional insurance of $1,200 on the same property in "The Fire Insurance Association." H. acted as agent for that company also, and he made the necessary entries thereof on the first three policies. In consequence of "The Fire Association" having ceased to take risks on that kind of property, H. asked the plaintiff for the interim receipt of that company, which he gave up accordingly, and H. substituted one in the Gore District Company for it, he being agent for that company also; but omitted to give any notice or make any entry as to the substitution of the Gore insurance for that of "The Fire Association."

In an action to recover the amount of the insurances, after a destruction of the property by fire:

Held, affirming the judgment of the court below, that this was not such an omission on the part of the plaintiff as invalidated the policies, in this following *Parsons* v. *The Standard Ins. Co.*, 43 U. C. R. 603; 4 A. R. 326; 5 S. C. R. 233.

In effecting insurances in all to the amount of $5,200, the plaintiff represented the property as being of "the cash value of $5,339 on two occasions, and $5,500 on a third occasion. In an action on the policies, the jury found that the value was $4,000 when first insured, and $4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company; and that the company intended that the goods should be insured to their full value, and rendered a verdict in favour of the plaintiff for $3,100, which the Divisional Court subsequently refused to set aside.

Held, in this reversing the judgment of the court below, that under the circumstances and in view of the nature of the goods insured, the over-value was such as under the first statutory condition in the policy, rendered the same void.

Osler and *Nesbitt*, for appellants.

Laidlaw and *Kapelle*, for plaintiff.

CARTER *v.* GRASETT.

Payment of mortgage does not give new estate —Derogation from grant of light—Obscure finding of jury—New trial—Grant of light —Registry laws.

The plaintiff was the owner of lot 8, and the defendant of the adjacent lot (9). At the time the plaintiff's lot was conveyed to him it had a house upon it, with windows looking over lot 9, which was then vacant, and was also the property of the plaintiff's grantors, subject to a mortgage. The equity of redemption in lot 9 was afterwards conveyed to one through whom the defendant acquired title; and G., the immediate predecessor in title of the defendant, satisfied the mortgage, and obtained and registered a discharge of it. Buildings were erected on lot 9 by the defendant and his predecessors, and the plaintiff complained of the interference by such erections with the access of light to his house on lot 8, insisting

there had been an express or implied grant of light over lot 9, and invoking the principle that a grantor cannot derogate from his grant.

Held, reversing the judgment of the Common Pleas Division, 11 O. R. 331, that by payment of the mortgage and registration of the discharge, G. did not acquire a new and independent estate, such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors.

Booth v. *Alcock*, L. R. 8, c. 663, and *Lawlor* v. *Lawlor*, 10 S. C. R. 194, distinguished.

In answer to the question, Did the defendant's house interfere injuriously with the light of the plaintiff's house? the jury answered, Yes, but not injuriously.

Held, OSLER, J.A., dissenting, that there should be a new trial, in order to have a clear finding as to the light.

Per OSLER, J.A., that the finding of the jury plainly was that the defendant's house did not interfere injuriously with the light, and, looking at all the circumstances, the justice of the case would not warrant the granting of a new trial.

Held, also, *per* PATTERSON, J.A., and FERGUSON, J., that there was an express grant to the plaintiff by the conveyance to him of lot 8, which was under the Short Forms Act, of all light used and enjoyed with the house; but,

Per PATTERSON, J.A., that upon the evidence, the defendant's house intercepted 'no light to which the plaintiff was entitled.

Per BURTON and OSLER, JJ.A., that the grant of light was an implied one, the conveyance of the house carrying with it all these incidents necessary to its enjoyment, which it was in the power of the vendors to grant; and the general words in the conveyance did not enlarge or limit the grant.

Per BURTON, J.A., that by his conveyance the plaintiff became entitled to the enjoyment of the right to the light from the vacant land to the same extent as it was enjoyed by his grantors at the time of the conveyance.

Held, also, *per* PATTERSON, J.A., that the conveyance to the plaintiff was as regards lot 9 unregistered, and the defendant should be allowed to set up the registry laws as a defence at the new trial directed.

McCarthy, Q.C., and *Geo. Bell*, for appellant. *Robinson*, Q.C., and *Symons*, for respondent.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [Mar. 9.

BERTRAM *v.* MASSEY MANUFACTURING CO.

Sale of goods—Contract—Delivery of part—Absence of brand—Quality of goods—Testing—Acceptance—Property in part not delivered.

The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire Crown bar iron of the T. K. brand. A part of the iron was delivered to the defendants, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it, and finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand.

Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to defendants merchantable iron bearing on its face the genuine brand contracted for; but in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co., of the quality usually indicated by the Crown brand, and so the defendants would have the right to test it, and, according to the findings of the jury, would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard did not estop the defendants from showing that the portion which was unbranded was also below the standard. But

Held, that the defendants, having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession.

Held, also, that the property in the part of the iron which was not delivered to the defendants must be taken to remain in the plaintiffs; for the defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it.

The action was treated as one for the price of iron which the defendants accepted, and for damages arising from their refusal to accept the remainder; and, in accordance with the findings of the jury, which in the opinion of the court were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only (the damages having been negatived by the jury); and for the defendants upon their counter-claim for damages sustained from the breach of contract other than by reason of the inferior quality of the iron.

Robinson, Q.C., and *Lash*, Q.C., for the plaintiffs.

McCarthy, Q.C., *Watson*, and *J. M. Clark*, for the defendants.

Practice.

Boyd, C.] [April 9.

MILLS *v.* MILLS.

Foreign commission—Evidence of party—Alimony action—Criminal proceedings.

There is no hard and fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in case of the examination of a party being sought, the court will be more circumspect than in the case of an ordinary witness. In an action of alimony, where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who left the jurisdiction and applied to be examined abroad,

Held, that the defendant was a necessary witness, and that the reason given by him for not being able to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, was sufficient, and a commission was ordered.

J. E. Hodgins, for the plaintiff.

Hoyles, for the defendant.

Boyd, C.] [April 16.

In re JACKSON-MASSEY *v.* CROOKSHANKS.

Infant—Defendant qua executor—Service on official guardian.

Held, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid.

The provisions of the rules and general orders as to service in case of infancy apply, whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity.

W. H. Blake, for the plaintiff.

J. Hoskin, Q.C., for the infant.

Boyd, C.] [April 18.

HACKET *v.* BIBLE.

Solicitor and client—Authority of solicitor to settle—Variation of interpleader order.

A solictor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained, he has the ordinary rights of solicitors as in other contested cases.

And where solicitors properly representing the claimant and the execution creditors in an interpleader, made an arrangement by which $441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both solicitors, in good faith distributed $441 among the creditors entitled, and paid only the balance into court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended.

Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties.

Bain, Q.C., for the claimant.

H. J. Scott, Q.C., for the sheriff.

SUPREME COURT OF PRINCE EDWARD ISLAND.

Palmer, C. J.] [Hilary Term, 1888.

QUEEN *v.* HUGHES.

Canada Temperance Act—Third offence—Validity of lease of bar to son of owner—Attempt to evade the law.

The defendant owned a dwelling house with shop attached, and a bar at the rear of the shop. He had been previously convicted for a first and second offence under the Canada Temperance Act. After these convictions, he made a lease of his shop and groceries and the bar to his son, but continued to live on the premises. Liquor was sold on the premises with the knowledge of the defendant, who put in for defence the lease to his son. By s. 119 Canada Temperance Act, "No conviction of any offence against the second part of this Act shall be removed, by *certiorari* or otherwise, into any of Her Majesty's courts of record." The prosecutor and stipendiary magistrate consented to a rule being granted for a writ of *certiorari* to issue to facilitate the testing of the question raised in the case, *i.e.*: Was the lease a *bona fide* transaction between father and son? The lease contained no conditions of forfeiture in case the lessor engaged in the above illegal traffic, but contained a condition that it was not to be assigned without the consent of the lessor.

Held, (1) That whatever might in law be the effect of the lease, as between father and son it is void, is in fraud of the law, and against public policy, as being a contrivance the better to enable parties to carry on an illegal traffic in contravention of the Canada Temperance Act—a law which the highest court of justice, the Privy Council of Great Britain, has designated one for the promotion of public order, safety, and morals, and which subjects those who contravene it to criminal proceedings and punishment.

(2) That the assumed exclusive possession of the shop and the bar-room behind it by the son, was merely colourable, and there was no evidence to relieve the defendant, the lessor, of his liability for the illegal traffic still carried on in the bar, an apartment under his own roof and daily within his own observation.

Law Students' Department.

IN this issue we continue the papers set at the examination before Hilary Term, 1888.

LAW SOCIETY EXAMINATION QUESTIONS.

SECOND INTERMEDIATE.

REAL PROPERTY.

1. What is meant by the enactment that a feoffment shall not have a tortious operation?
2. Explain the difference in their effect upon an estate granted between a condition precedent and a condition subsequent.
3. What leases are required to be made by deed?
4. What is the difference between an estate in common and an estate in joint tenancy?
5. If a tenant in tail purchases the fee what is the effect? Why?
6. A dies intestate leaving a widow, a son, a daughter of a deceased son, and a brother. How is the land disposed of under the Statute of Victoria?
7. What power has a married woman of disposing by will of her property?

BROOM'S COMMON LAW—O'SULLIVAN'S GOVERNMENT IN CANADA.

1. Explain *general customs* and *particular customs;* and enumerate the principal qualities which are essential to binding customs.
2. Into what three classes does Broom divide the grounds on which actions for torts are maintainable? Give an example of each.
3. Explain the meaning of *independent* covenants, *dependent* covenants, and *concurrent* covenants.
4. Of what things could larceny not be committed at common law?
5. Mention the principal rules which should govern the construction (*a*) of a penal statute; (*b*) of a beneficial statute.
6. Give an example of homicide rendered excusable by *ignorantia facti*.
7. Mention the qualifications of a senator of the Dominion of Canada.

PERSONAL PROPERTY—JUDICATURE ACT—STATUTES.

1. What is meant by saying that there is no estate in personal property?

2. What rights over personal property has a married woman at common law? How varied by statute?

3. Explain the various modes by which a valid sale of personal property can be made.

4. What steps may an administrator take to compel a creditor against the estate to take action to assert his claim?

5. A is a merchant. Being in difficulties A asks B for a loan to enable him to carry on his business. B agrees to lend A $500 on the security of his stock. How can the transaction be arranged so that B can be secured?

6. What is a demurrer? What is the effect of a demurrer allowed (*a*) to the whole statement of claim, (*b*) to part of the statement of claim?

7. A writ of summons is endorsed for debt, and also detention of goods. Defendant fails to appear. What may plaintiff do?

EQUITY.

1. Distinguish between good consideration and valuable consideration. What must you show to uphold a voluntary conveyance under 27 Eliz. c. 4?

2. A buys a property and has the conveyance made to B his son. What effect has such a conveyance? Explain fully.

3. A brings an action against B for an account; B sets up in defence that the account is settled. Has A any remedy? If so, what?

4. A solicitor purchases a property from his client who seeks to have the contract set aside on the ground of the relationship between them. What will the solicitor prove in order to uphold the transaction?

5. A, who is lessor of B of a certain farm which B is occupying, enters into a verbal agreement with him for the sale of it to him; B pays part of the purchase money: A afterwards seeks to repudiate the contract, alleging that there was no binding agreement. Can B succeed in an action for specific performance?

6. In how far can a Court of Equity deal with an agreement concerning the sale of lands outside its jurisdiction.

7. Define Champerty and Maintenance, giving an example of each. A lends to B money on mortgage to provide him with funds for the purpose of carrying on a suit. Under which head would this fall?

Miscellaneous.

THE COUNTY OF YORK LAW ASSOCIATION LIBRARY.

New additions:

Cababe (Michael) Attachment of Debt and Receivers, 2nd ed., London, 1888.

Canadian Parliamentary Companion, Ottawa, 1888.

Cox (Homersham M. A.) The British Commonwealth, London, 1854.

Dart (J. H.) The Law and Practice Relating to Vendors and Purchasers, 6th ed., London, 1888.

Drewry's Reports, 4 vols., 1852-9.

Emden's Annual Digest for 1887.

Giffard's Reports, 5 vols., 1857-66.

Rawley (W. H.) Treatise on the Law of Covenants for Title, Boston, 1887.

Taché (L. H.) Legal Hand-Book and Legal Law List, Toronto, 1888.

Taschereau (H.) The Criminal Statute Law of Canada, Toronto, 1888.

Wilson (A.) The Judicature Acts, Rules, etc., London, 1878.

Winslow (R.) Law of Private Arrangements between Debtors and Creditors, London, 1885.

Supplement to the above, London, 1888.

BOOKS RECEIVED.

THE Criminal Statute Law of the Dominion of Canada, relating to indictable offences, with full text as revised in 1886, and put into force by Royal proclamation on the 1st day of March, 1887, and cases, notes, commentaries, forms, etc. by Henri Elzear Taschereau, one of the judges of the Supreme Court of Canada. Second edition, revised, re-arranged and enlarged. Toronto: Carswell & Co., Law Publishers, 1888.

A Legal Hand-Book and Law List for the Dominion of Canada, and a book of Parliamentary and General Information, prepared by Louis H. Taché, Advocate. Toronto: Carswell & Co., Law Publishers, 1888.

A Compendium of the Law of Torts. Specially adapted to the use of students. By Hugh Fraser, M.A., LL.M. London: Reeves & Turner.

LAW BOOKS.—We have received a catalogue of Law Works published by Stevens & Sons, 119 Chancery Lane, London, W. C. This is an old and well-known publishing house, having been established in 1810. It is also an enterprising and reliable one. The catalogue includes modern law works, English, Irish and Scotch reports, etc.

NEW LAW BOOKS.

We have received from the Blackstone Publishing Company of Philadelphia, the following books: Odgers on Libel and Slander, 1887; Shirley's Leading Cases, 3rd Eng. ed.; Lewin on Trusts, Vols. I. and II. (the third volume of this work will, we understand, be issued shortly).

These new and most valuable works are a great addition to what is fast becoming the law library of these enterprising publishers. Subscribers will soon receive Short on Informations. This work deals with the subject of criminal informations and *quo warranto* proceedings, also *mandamus* and prohibition. Other books recommended to be published during the present year by the editor are as follows: Lindley on Partnership, ed. of 1888; Smith's Leading Cases, ed. of 1887; Pollock on Contracts; Finch's Leading Cases on Contracts; Theobold on Wills; Snell's Principles of Equity; Archbold's Criminal Pleading and Evidence; Porter on Insurance; Eversley Law on Domestic Relations; Broom's Common Law; Broom on Constitutional Law; and A Chapter on Trusts for Accumulation, by W. C. Scott, of Philadelphia. It will be seen by the above how carefully this series is being prepared. All these books will be reprinted from English editions subsequent to 1885.

A LEGAL ORNAMENT—NO FAMILY SHOULD BE WITHOUT IT.—"My ma has put a coat of varnish on all our furniture," bragged a little boy to his comrade on the street. "Shucks! that's nuthin," retorted the other, in disdain, "My pa is going to put a chattel mortgage on all of ourn."—*Ex.*

LATEST LEGAL STYLES.—Mortgages are signed by two witnesses the same as last year, and are folded so as to fit the side coat pocket. The back taxes are combed forward and parted on the side nearest the mortgagee. In this climate, mortgages generally mature in the winter season.—*Duluth Paragrapher.*

Appointments to Office.

CORONERS.

Kent.

John C. Bell, M.D., Merlin.

DIVISION COURT CLERKS.

Halton.

James Robinson, of Nelson, Sixth Division Court, *vice* Gilbert C. Bastedo, deceased.

Parry Sound District.

David Patterson, of McKellar, Second Division Court, *vice* Henry Armstrong, resigned.

Peterborough.

Francis J. Bell, of Smith, First Division Court, *vice* Richard W. Errett, resigned.

Leeds and Grenville.

Cyrus A. Wood, of Kitley, Seventh Division Court, *vice* Hiram McRae, deceased.

BAILIFFS.

Victoria.

Gilbert T. Smith, of Woodville, First Division Court, *vice* Alex. B. McLean, resigned.

Perth.

Alex. Munro, of Mornington, Fifth Division Court, *vice* John J. Whaley, resigned.

Peterborough.

Joseph Griffin, of Peterborough, First Division Court, *vice* Charles Stapleton, resigned.

Law Society of Upper Canada.

HILARY TERM, 1888.

The following gentlemen were called to the Bar during Hilary Term, 1888, *viz.*:—*Feb. 6th*, —Francis Alexander Anglin, with honours, and awarded a silver medal; Francis Patrick Henry, William Howard Hurst, William Edward Sheridan Knowles, John Hood, George Ira Cochran, Edward Corrigan Emery, James Adam McLean, William Lyon Mackenzie Lindsey, John Williams Bennet, Jeffrey Ellery Hansford, Albert Edward Trow, John Henry Alfred Beattie, Thomas Hislop, Albert Edward Dixon, George William Ross, Clarence Russell Fitch, Colin Judson Atkinson. *Feb.* 7th. —Nicholas Ferrar Davidson, Arthur Edward Watts. *Feb. 11th*—Hugh Guthrie, Charles Edgar Weeks, George Smith. *Feb. 17th.*—George Nelson Weekes, Francis Ambridge Drake.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz.*:—

Nov. 22nd, 1887.—G. L. Lennox. *Feb. 6th*, 1888.—N. F. Davidson, F. A. Anglin, J. A. McLean, J. M. Mussen, A. Grant, A. E. Trow, W. W. Jones, W. L. M. Lindsey, F. A. Drake, H. Guthrie, H. A. Percival, C. R. Fitch, C. J. Atkinson, A. E. Dixon. *Feb. 7th.*—J. Hood, E. J. B. Duncan, W. J. Millican. *Feb. 11th.* —F. P. Henry, J. Carson, E. C. Emery, W. H. Wallbridge. *Feb. 17th.*—A. E. Watts, G. N. Weekes.

The following gentlemen passed the Second Intermediate Examination, *viz.*:—M. H. Ludwig, with honours and first scholarship; G. W. Littlejohn, with honours and second scholarship; W. S. McBrayne, with honours and third scholarship; and Messrs. S. H. Bradford and J. F. Gregory, with honours; E. O. Swartz, W. C. Mikel, E. E. A. Du Vernet, D. H. Chisholm, W. Pinkerton, H. B. Cronyn, O. Ritchie, E. P. McNeil, M. S. Mercer, F. B. Denton, A. E. Cole, F. Rohleder, G. D. Heyd, J. W. S. Corley, A. D. Scatcherd, A. E. Baker, A. S. Ellis, F. B. Geddes, D. A. Dunlap, C. D. Fripp, R. O. McCulloch, W. J. L. McKay.

The following gentlemen passed the First Intermediate Examination, *viz.*:—A. W. Anglin, with honours and first scholarship; J. B. Holden, with honours and second scholarship; R. E. Gemmill, with honours and third scholarship; and Messrs. J. Agnew, A. J. Armstrong, W. L. E. Marsh, D. W. Baxter, D. R. McLean, C. E. Lyons, A. F. Wilson, G. A. Cameron, W. Carnew, H. Macdonald, A. E. Slater, A. H. O'Brien, J. J. O'Meara, F. Harding, J. R. Layton, F. L. Webb, J. A. McIntosh, J. Porter, A. Crowe, F. W. Maclean, A. D. Crooks, A. Elliott, R. Barrie, W. H. Cawthra, W. Mackay, W. Yorke, J. F. Hare, D. Holmes H. Jamieson, W. Kennedy.

The following candidates were admitted as Students-at-law, *viz.*:—*Graduates*—M. Monaghan, E. G. Fitzgerald, C. J. Loewen. *Matriculants*—W. D. Earngey, J. E. O'Connor, J. C. Quinn. *Juniors*—J. Ballantyne, J. E. Varley, G. S. Morgan, J. R. Milne, D. B. Mulligan, L. Lafferty, A. J. Pepin, C. C. Fulford, P. F. Carscallen, W. H. Cairns.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. MAY 16, 1888. NO. 9.

IN our notes of cases in this number, we give two decisions, the one by the Court of Appeal for Ontario, the other by the Supreme Court of Canada, on the vexed question of the commencement of controverted election trials more than six months after the presentation of the petition. The case decided by the Supreme Court is the now well-known Glengarry controverted election petition. It will be seen that the five judges of the Supreme Court were not unanimous in their findings. GWYNNE, J., dissents from every position taken by his learned colleagues in the decisions arrived at by them; and RITCHIE, C.J., joins with him in dissenting from the conclusion that an order for the extension of the time for trial, granted after the expiration of the six months, is invalid, and can give no jurisdiction to try the merits of the petition, it being then out of court. The judgment pronounced was, then, that of a divided court, three of the judges sustaining the appeal, and two of them being adverse to it. It will be interesting to see the reasons given by these learned and able judges in support of their dissenting judgments. Without giving any opinion ourselves, it may be said that there are several in the profession in Ontario whose views seem to coincide with those of the learned judge who hails from this province.

AN examination of the report relating to the registration of births, marriages and deaths in Ontario for 1886, the last report issued, reveals some interesting, though by no means encouraging facts, in regard to the duration of life among lawyers, as compared with men engaged in other callings. Cultivators of the soil, as might be expected from their independent open air life, are longest lived, attaining an average age of almost 63 years. Professional men come next with an average of 58 years, labourers have an average life of 53 years, while mechanics as a class reach an average of almost 52½ years. Under the general head of professional men, those classed as "gentlemen," live to the age of 69. What professional gentleman would not prefer to be a gentleman by profession? Lawyers pass away at 45, physicians live nine years longer. But we commend dentistry to those who long to reach a ripe old age, the death of but one dentist is recorded, and "he filled his last cavity" at the age of 77. The good often die young, but if they escape the perils that beset youthful goodness, their chances of life are excellent. The average life of clergymen is 18½ years more than that of their professional brethren of the courts. The arduous labours of public officials in holding their situations, drawing their salaries and determining knotty points of precedence, hurry them to an untimely tomb at 50.

WE regret to have to record the death of Mr. Justice Henry, of the Supreme Court of Canada, at Ottawa, on the third instant. He had been suffering from an attack of paralysis for some weeks, and, notwithstanding occasional signs of improvement, continued to grow worse until death came. The life of the deceased judge was a long and eventful one. He was born at Halifax, N.S., in 1816, so that he was in his 72nd year. He was called to the bar of his native province in 1840, and, from that time until his death, he has almost constantly served his country in some public capacity. Shortly after his call to the bar he served in the Legislative Assembly as member for Sydney, which he continued to represent until 1867, when his support of the proposed confederation scheme cost him his seat. For several years he also held the office of Mayor of Halifax. During these years, notwithstanding his arduous public services, he rapidly gained distinction in his profession. He became a member of the Legislative Council, and was the active promoter of several legal reforms. His measure for chancery reform was the first step in that direction in any English-speaking community. He was for some time Solicitor-General of Nova Scotia, but finally separated from his old colleagues of the Liberal party, with which party he had always identified himself, on the question of the Catholic disabilities. The Opposition gained office, and Mr. Henry became Solicitor-General in the new Government. He acted for Nova Scotia as a delegate on several important missions, amongst others at Washington, whither he went to secure a renewal of the Reciprocity Treaty of 1854; at London, to urge on the Imperial Government the necessity of constructing the Intercolonial Railway; and also as a member of the convention which laid the foundation of confederation. He was appointed to the Supreme Court of the Dominion thirteen years ago. His long, active, and eventful life was devoted to the service of his country. His death leaves a vacant place in the ranks of the many gifted men who have come from our Maritime Provinces to take part in working out to a successful issue the destinies of this Dominion.

We are pleased to learn that McGill University has conferred the degree of D.C.L. on Mr. J. J. Maclaren, of this city. We congratulate Dr. Maclaren on the richly merited honour of which he has been the recipient. The degree was obtained in course, the learned doctor having been for some years a B.C.L., of McGill University. The thesis which Mr. Maclaren wrote preparatory to the degree treats of Roman Law in English Jurisprudence. It goes back to the days of the Roman occupation of Britain, and the time of Saxon and Danish rule. In these times the traces of Roman law are found chiefly in the manorial system, in municipal institutions, and in the law of wills and donations. The period of the Norman Conquest is more fully dealt with, and the names of Glanville, Bracton, Fleta, and Britton, occupy a prominent place in this portion of the narrative. The influence of the civil law on the common law is, of necessity, treated only in brief outline, as also the Court of Chancery, which has often been described as "Roman to the backbone." We give the conclusions at which Dr. Maclaren has arrived, in his own words :—

1. That a large portion of the English common law, generally supposed to be indigenous, is of Roman origin, having either survived from the Roman occupation, or having been subsequently introduced through the influence of the Church, or under the early Norman kings.

2. That further additions were made to these Roman law elements in consequence of the revival of the study of civil law under Vacarius and his successors, and the incorporation by Bracton into his work of a considerable part of the *Corpus Juris*, either previously embodied in the common law or inserted by him as not being inconsistent with its provisions.

3. That many of the principles of the civil law were adopted through the medium of the Court of Chancery, the ecclesiastical courts, and the Court of Admiralty, where the civil law rules were either adopted or generally recognized as authorities.

4. That even in the common law courts, the extension of the law to meet the requirements of advancing civilization, and particularly the development of modern mercantile law, were largely on civil law lines, through the adoption of the *lex mercatoria*, and the favour with which eminent judges, such as Lord Holt and Lord Mansfield, regarded the Roman law.

5. That recent legislation, as, for instance, the extension of the rules of equity by the Judicature Act, has infused the equitable principles of the civil law into the law of England.

THE LAW OF DOWER.

SOME time ago we took occasion to express some doubt as to the correctness of the construction placed on the 42 Vict. c. 22 (O.), (now embodied in R. S. O. c. 133, s. 5, *et. seq.*) by the cases of *Smart* v. *Sorrenson*, 9 O. R. 640, and *Calvert* v. *Black*, 8 P. R. 255. These observations, which are to be found *ante* vol. 21, p. 405, have recently received additional force from the fact that in a recent case before the Chancellor, of *Re Croskery*, that learned judge has expressed a very strong opinion adverse to those cases. *Re Croskery* was an appeal from the Master in Chambers refusing an application by mortgagees to pay the surplus moneys into Court which remained in their hands, after satisfying their mortgage; the money in question having been derived from a sale of mortgaged property under a power of sale. Claims were made to the fund on the part both of the wife of the mortgagor, and his assignee for the benefit of creditors. If *Smart* v. *Sorrenson* were correct, the wife of the mortgagor could, of course, have no claim to the funds, her husband being still alive, and his equity of redemption having been extinguished, and the Master in Chambers so held, and therefore refused the application. But the Chancellor was of the opinion, after a careful examination of the authorities, without expressly overruling *Smart* v. *Sorrenson* and *Calvert* v. *Black* (which sitting in Chambers it was not competent for him to do), that the claim of the wife was of such a character that the mortgagees

ought not to be put to the risk of determining whether it was, or was not, well founded, and were, therefore, entitled to pay the money into court, and he, therefore, allowed the appeal.

The Act seems to us clearly to recognize the fact that, in circumstances such as existed in *Re Croskery*, the mortgagor's wife's inchoate right of dower is to be protected, and this can only be done effectually either by setting apart a sum to be invested, the income of which during the husband's life would be payable to him or exigible by his creditors, and the capital of which would have to be preserved, until it was seen whether or not the wife survived her husband. If she did, it would be payable to her, and if she did not, it would be payable to the mortgagor, and be exigible by his creditors. Or, on the other hand, the wife's interest may be ascertained, on the principle on which deferred annuities are valued, and her claim satisfied by a present cash payment in accordance with such valuation.

DIVORCE.

WHILST we are thankful that in this country we have not the facility for dissolving the marriage tie, which is, unfortunately, only too easy in the country to the south of us, and now not much better in England, we are glad to know that the procedure in our Divorce Court has been at length placed upon an intelligent, and as far as possible, on a satisfactory footing. The rules, orders and forms of proceeding of the Senate of Canada have, as we have already announced, been definitely settled and adopted by the Senate. They may well be published (which is done in another place) for the benefit of all parties who may have occasion to refer to them.

In the exhaustive and interesting speech made by the Hon. Mr. Gowan, in moving for a special committee to frame these rules and forms, and for regulating the procedure upon applications for divorce before the Senate, the whole subject was fully laid before the House, and an historical review given of the origin and position of the divorce law in this Dominion, and its various Provinces. Ample reasons were also given for the suggested changes in the then procedure. Were it possible, we should like to quote very largely from it, but must content ourselves with the following extract which shows the careful thought bestowed on the subject:—

"It has been urged that the establishment of a divorce court similar to that of England is desirable in order to secure cheap, speedy, sound and uniform administration, and that the machinery for divorce should be purely judicial, rather than quasi judicial and legislative, and arguments, of more or less cogency, have been used in favour of a special court.

"I am free to admit that a proceeding of a judicial character by a legislative process is not without inconvenience; but upon public grounds I should not desire to see Parliament divest itself of control in a matter which lies at the very foundation of morality, and the purity of domestic life, and consequently the well-being of society.

"It is well there should be room for elastic action—the refusal to pass a law in favour of one who has outraged decency and morality—the power to exercise penal legislation, if I may so put it, in gross cases. This power, in the public interests, should I think, remain with Parliament. When involved in the exercise of its high functions to make a special law in a particular case, perfect freedom of action should be preserved.

"A court of divorce could merely declare the law and pronounce fixed judgment, having relation to the individual contest alone.

"There may be inconvenience, as I have said, in the legislative process, but I do not think the inconvenience is insurmountable. I believe it may be minimized or overcome by appropriate rules regulating divorce proceedings.

"But in any case, the argument in favour of the establishment of a court seems open to objection, and as at present advised I do not think it would be in the public interests.

"The number of cases coming before Parliament is increasing, but with only thirty cases since Confederation, the probable number would not warrant the large additional burden, the establishment and maintenance of such a tribunal would involve.

"'Tis true in Parliament these cases are disposed of but once a year, while a Divorce Court would be always open; but I am disposed to think *it would be anything but a blessing* to offer the temptation of a court sitting always, for hasty appeals to dissolve the marriage tie. Moreover, there would be more technicality, of necessity, in the proceedings of a court, as may be seen in looking over the proceedings of the English Divorce Court cases, and many vexatious impediments not likely to occur in Parliament. Then, as to delay: in most cases I think the time in obtaining a final decree from a court would not be less, in the majority of cases, than in obtaining an Act for divorce.

"The costs of obtaining a private Act are said to be high, and some regard this as an evil; but I venture to say they would be little less in a Divorce Court contest; and so, neither on the ground of simplicity and speed, nor economy in procedure, can the arguments in favour of a Divorce Court, in my opinion, be sustained.

"Something has been urged with more force, on the ground of uncertainty in procedure. I must admit the existing procedure is incompetent and unsatisfactory. I believe, however, this may be cured by a revision of the Rules for Divorce, and that a simple and intelligible practice can be devised, under which parties interested, or their legal advisers, could be able to clearly know the method and conditions upon which relief would, if granted at all, be obtained, and which would prevent improper appeals to Parliament—and guard against fraud and abuses."

As will be seen by a perusal of the rules, a committee of nine senators is appointed, called the Select Committee on Divorce, to whom are to be referred all petitions and bills for divorce and all matters arising thereout. This Committee practically constitutes the Divorce Court of the Dominion. The original proposition was to make the Committee consist of seven members of the Senate, and we confess to the thought that the smaller number would have been preferable to the larger one which was afterwards agreed to.

It is not necessary to enlarge upon the danger and impropriety of the old procedure, which practically left to the member having charge of the bill to select the judges who were to pass upon the case. It was at least in bad taste, and contrary to first principles underlying judicial determinations. Again, a relic of

antiquity has been disposed of by getting rid of the absurd practice of taking the evidence of witnesses to prove service at the bar of the house on written questions. The same Committee will now be the tribunal for dealing at once with all questions of a preliminary and formal character, as well as the facts and circumstances upon which the bill of divorce is founded. The orderly conduct of the proceedings has been provided for, and the same rule of evidence which governs in indictable offences is laid down in this matter, with certain necessary exceptions. The applicant for divorce, as well as the party from whom the divorce is sought, may be examined upon oath. In all cases not otherwise provided for, the procedure is to follow the rules and usages of the House of Lords in respect to bills for divorce. As, however, we give the rules in *extenso*, it will not be necessary to refer to them at greater length.

In reading the debates which took place in the Senate in reference to this subject, one can not but remark upon the difficulty of making any satisfactory progress, owing to the views of a number of the senators whose religious opinions are entirely opposed to divorce under any circumstances whatever. This is to be deplored, for it may as well be accepted that marital difficulties will occur as long as the world lasts, and there must be a divorce law of some sort, and it is only wisdom to make it as perfect as possible. But whatever may be the result in administration of the reforms in the procedure now inaugurated, there can be no doubt that sound views respecting the purity of the home and the family, and its importance as a factor in the prosperity of any people, have been enunciated, and attention has been drawn to a subject of very great importance, both from a religious, moral and social standpoint.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for April comprise 20 Q. B. D. pp. 441-596; 13 P. D. pp. 41-75; and 37 Chy. D. pp. 327-540.

BREACH OF PROMISE OF MARRIAGE—ACTION AGAINST REPRESENTATIVES OF DECEASED PROMISOR—ACTIO PERSONALIS MORITUR CUM PERSONA.

The first case in the Queen's Bench Division to be noted is *Finlay* v. *Chirney*, 20 Q. B. D. 494, to which we made some reference, *ante* p. 161. This was an action for breach of promise of marriage brought against the personal representatives of the promisor. The pleadings contained no allegation of any special damage, but, by special leave of the Court of Appeal, particulars of alleged special damage were delivered pending the appeal from an order of Field and Wills, JJ., granting a new trial. These particulars were, (1) Amount expended in the purchase of a trousseau; (2) Maintenance of plaintiff from date of promise to the death of the testator; (3) Costs occasioned by the birth of a child, the result of the seduction of the plaintiff by the testator under the promise of marriage in

question, including cost of maintenance until testator's death; (4) Loss of parish allowance for each of her three legitimate sons, withdrawn in consequence of the birth of the illegitimate child; (5) Loss, owing to the birth of the illegitimate child, of a legacy of £100, which would otherwise have been left to plaintiff by her mother, in common with her brothers and sisters. The Court of Appeal (Lord Esher, M.R., and Bowen, L.J.) were of opinion that, (1) a breach of promise of marriage, without any allegation of special damage, is a mere personal injury, to which the maxim *actio personalis moritur cum persona* applies, and, therefore, no action therefor will lie against the representatives of a deceased promisor; (2) that none of the particulars alleged constituted such special damage as entitled the plaintiff to recover; and (3) that the only special damage which would be recoverable in such an action would be something affecting the money value of the contract to the plaintiff, and part of the consideration for the promise, and brought to the knowledge of the other party at the time of the contract, in order to bring it within the principle of *Hadley* v. *Baxendale*, 9 Ex. 341. In the judgment of Bowen, L.J., is to be found an instruction disquisition on the maxim *actio personalis*.

ORDER FOR ALIMONY PENDENTE LITE—FINAL JUDGMENT.

In re Henderson, 20 Q. B. D. 509, a question was raised whether an order for the payment of alimony *pendente lite* was a "final judgment," entitling the wife to issue a bankruptcy notice against her husband for non-payment of arrears, and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held that it was not.

ORDER DISMISSING ACTION FOR WANT OF PROSECUTION—FINAL JUDGMENT.

A similar question arose *in re Riddell*, 20 Q. B. D. 512, but in this case the point raised was whether an order dismissing an action with costs for want of prosecution was a "final judgment," and the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) came to the conclusion that it was not; a similar decision we may remark to that of the Supreme Court in *Cauchon* v. *Langelier* (see *ante* pp. 184-5). Lord Esher, M.R., defines a "final judgment" to be "a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant, is finally determined in favour of either the plaintiff or defendant." Fry, L.J., without giving any definition of a "final judgment," says, that "nothing can be a final judgment by which there is not a final and conclusive adjudication between the parties of the matters in controversy in the action;" and Lopes, L.J., defines a "final judgment" to be "a final adjudication of the matters in contest in the action between the parties to the action."

VENDOR AND PURCHASER—AGREEMENT FOR PUCHASE OF LEASE—CONSTRUCTIVE NOTICE OF COVENANTS IN LEASE.

In *Reeve* v. *Burridge*, 20 Q. B. D. 523, the plaintiff sought to recover from the defendant £100, liquidated damages for breach of a contract of purchase of

a leasehold, and the question turned on whether, by entering into the contract without any opportunity of inspecting the lease, the defendant was to be deemed to have had constructive notice of the existence of certain onerous covenants in the lease, the existence of which was the ground on which he refused to carry out the contract. Stephen, J., before whom the case was tried, held that the defendant had such notice; but the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) overruled him on this point. Fry, L.J., who delivered the judgment of the Court, considers the case was governed by *Hyde* v. *Warden*, 3 Ex. D. 72, although, in that case, the purchase of a sub-lease was in question; and, on page 528, he says, "that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deeds before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract."

HUSBAND AND WIFE—SEPARATION—ACTION BY WIFE TO RECOVER MAINTENANCE—STATUTE OF FRAUDS.

McGregor v. *McGregor*, 20 Q. B. D. 529, is a case which marks the crumbling away of old ideas regarding the relationship of husband and wife. The action was brought by the wife against her husband to recover six weeks' arrears of maintenance, agreed to be paid to her by the defendant as one of the terms of an agreement for separation. It was objected that the parties could not contract with each other without the intervention of a trustee; and also that the agreement was not to be performed within a year, and was, therefore, void under the Statute of Frauds, because it was not in writing. But the Divisional Court (Stephen and A. L. Smith, JJ.) overruled both objections, holding that the agreement for separation was valid, that it was competent for the parties to enter into such a contract without the intervention of a trustee, and that it was one that could be enforced by the one against the other. As to the point raised as to the Statute of Frauds, the court held that, as the action was merely to recover six weeks' arrears—even if the agreement were one within the Statute—the plaintiff was entitled to recover as for money paid at the defendant's request, the consideration being executed, following *Knowlman* v. *Bluett*, 9 Ex. 307.

WINDING-UP ACT—ACTION AGAINST LIQUIDATORS—STAYING ACTION—COMPANIES ACT, 1862, S. 87—(R. S. C. C. 129, S. 16.)

Graham v. *Edge*, 20 Q. B. D. 538, was an action brought against the official liquidators of a company after a winding-up order had been made, to recover rent charged on property which had vested in the defendants as liquidators. The leave of the court had not been obtained to the bringing of the action, and the defendants applied to stay the proceedings. Huddleston, B., and Manisty, J., stayed the proceedings, holding that the action was in effect one against the company, though Manisty, J., expressed some doubt on the point.

FALSE IMPRISONMENT—REASONABLE AND PROBABLE CAUSE.

Howard v. *Clarke*, 20 Q. B. D. 558, was an action for false imprisonment, in which a verdict having been rendered for the plaintiff for £25, the defendant moved to set aside the verdict and enter judgment for the defendant. The case arose as follows:—By the Pawnbrokers' Act, 1872 (35 & 36 Vict. c. 93, s. 34), in any case where, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen, or otherwise illegally or clandestinely obtained, he may seize and detain the person and the article and deliver them to the custody of a constable. The plaintiff offered to pawn with the defendant—a pawnbroker—a gold horseshoe pin set with seven diamonds, and a ring. The defendant had previously received notice from the police of articles recently stolen, among which was "a gold horseshoe pin set with seven diamonds," and a ring; and he asked the plaintiff if he was a dealer. He replied he was not. The defendant also asked where plaintiff had obtained the articles, and the plaintiff stated he had got them from a publican, whose name and address he gave. The plaintiff gave the defendant into custody. It was subsequently proved that the plaintiff had not stolen the articles, and that his statements were true. At the trial the judge left it to the jury whether the defendant had a reasonable suspicion; but the court (Mathew and A. L. Smith, JJ.) held that this was misdirection, and that it was for the judge to say whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained, and that, no matter whether the question was for judge or jury, on the facts there was no evidence of absence of such reasonable suspicion, and therefore judgment was given in favour of the defendant.

COMPANY—SALE OF SHARES—REFUSAL OF COMPANY TO REGISTER TRANSFER.

The only other case in the Queen's Bench Division to be noticed is *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576. In this case a sale of shares had been made through brokers in the Stock Exchange, and the purchaser, according to the practice of the Stock Exchange, had paid for the shares on receiving a duly executed transfer of the shares. On applying to the company to register the transfer, the directors, who were empowered by the articles of the association in their discretion to decline to register a person claiming by transfer of shares, refused to register the transfer; whereupon the transferee brought the action to recover back the price of the shares from the vendor as money had and received to his use. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), however, held that the contract did not import an undertaking by the vendor that the company would register the transfer, and, therefore, the action failed; and Lord Esher expressed the opinion that the same result would follow, even though the directors had had no option, and had wrongfully refused to register the transfer.

SHIP—COLLISION—RELATION OF TOW AND TUG—LIABILITY OF VESSEL IN TOW.

One or two of the cases in the Probate Division call for a brief notice. In *The Niobe*, 13 P. D. 55, the question of the relationship between a tow and a tug

is discussed, with regard to the liability of the former for collision by the latter. In this case, a tug having a vessel in tow came into collision with another vessel. The collision might have been avoided had a proper look-out been kept on board the vessel in tow, and had she warned the tug that she was in danger of collision by continuing on her course. Under these circumstances, Sir James Hannen held that the owners of the tow were liable, and that, under the ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them.

CODICIL—EXECUTION—ACKNOWLEDGMENT.

In *Danitree* v. *Fasulo*, 13 P. D. 67, a codicil was propounded for probate, the execution of which was disputed. The testatrix, it appeared, had produced a paper to the witnesses to attest; but one of the witnesses saying she did not wish to know what it was, she refrained from making any explanation about it, and the witnesses signed the paper which they identified as the codicil. One of the witnesses was sure that the name of the testatrix was on the paper when she signed it; but she could not recollect that the testatrix had signed it in her presence. She did not read the paper, and was not aware that it was a testamentary paper. The other witness was unable to say whether she signed at the request of the testatrix or of the other witness; but when she went into the room the testatrix had the paper in her hand. This witness, also, had no idea of the nature of the paper, and did not recollect seeing the testatrix sign it; but she thought her signature was there when she put her own name to the paper. On this evidence, Butt, J., was of opinion that the codicil had been duly acknowledged by the testatrix, and it was admitted to probate.

ADMINISTRATION WITH WILL ANNEXED—GRANT TO STRANGER IN BLOOD—MINOR.

In the goods of Webb, 13 P. D. 71, administration with the will annexed was granted to a stranger in blood who had been elected by the testator's children as their testamentary guardian, without notice to the next of kin entitled to the grant, it being shown that one had renounced, and that the remainder were at a distance, or their place of residence unknown.

ADVERTISEMENT OFFERING REWARD FOR EVIDENCE—CONTEMPT OF COURT.

The only other case in the Probate Division is *Butler* v. *Butler*, 13 P. D. 73, a suit for divorce on the ground of the husband's adultery and cruelty. The defendant had issued and published about the district in which the wife and her family lived, a notice purporting to be signed by him offering £25 reward for evidence of the confinement of a young married woman of a female child, "probably not registered." The plaintiff moved for an attachment, and it was held by Butt, J., notwithstanding it was sworn that evidence had been procured in answer to the notice, that the publication of the notice was a contempt of court, as tending to prejudice the petitioner and discredit her in the assertion of her rights;

and a writ of attachment was ordered to issue, but the writ to lie in the office for three days, and during that time the defendant to be at liberty to apply to the court an affidavit that he had removed the objectionable placards.

TRUSTEE—BREACH OF TRUST—INDEMNITY—CONCURRENCE IN BREACH OF TRUST.

Proceeding now to the cases in the Chancery Division, *Evans* v. *Benyon*, 37 Chy. D. 329, first claims our attention. In this case a trustee had distributed a trust fund in breach of trust, at the request of one of the beneficiaries, from whom he took a bond of indemnity, the beneficiary undertaking to indemnify the trustee against "all consequences." The fund was distributed in favour of the daughters of one Edward Charles Evans, who concurred. In the events which happened the trustee himself and Edward Charles Evans became solely entitled to the fund as next of kin of the tenant for life, who had power to appoint the fund by will, but died without doing so. The trustee having died, the action was brought by his representatives against the beneficiary who had given the bond of indemnity, to compel him to replace the fund. Kay, J., held that he was bound to replace it; but the Court of Appeal (Cotton, L.J., Hannen, P.P.D., and Lopes, L.J.) held that the bond of indemnity should not be so construed as to compel the obligor to make good any loss which the trustee as a beneficiary might sustain, and that, since the trustee himself could not have made a claim against himself for the breach of trust, there was no claim against his estate in respect of which his representative could claim indemnity against the obligor or his estate. And it was further held that E. C. Evans, having actively concurred in the distribution, knowing it to be a breach of trust, could not have made any claim against the trustee or his estate, even if he had not known that he had a possible interest in the trust fund, which, however, the court was satisfied he did know; and therefore, that as regarded his interest, there was no claim against the obligor under the indemnity. The action was therefore dismissed.

ACCORD AND SATISFACTION—CHEQUE BY THIRD PARTY FOR SMALLER SUM.

The case of *Bidder* v. *Bridges*, 37 Chy. D. 406, is one that is no longer of much importance in this Province, since R. S. O. c. 44, s. 53, ss. 7, has legalized the acceptance of payment of part of a debt as satisfaction for the whole; as to past transactions, however, it may be of some use. The short point involved was simply this: A plaintiff was liable for certain costs to the defendant, which were taxed, and the plaintiff's solicitor then gave his cheque for the amount taxed to the defendant's solicitor, who accepted it. After the cheque had been paid, the defendant's solicitor claimed that his client was entitled to interest on the costs, and the question was whether the acceptance of the cheque of the plaintiff's solicitor was a satisfaction of the whole claim. Both Stirling, J., and the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) held that it was, because the solicitor, by giving his cheque, became personally liable on it, and that was an additional consideration, so as to take the case out of the rule laid down in *Foakes* v. *Beer*, 9 App. Cas. 605.

PRACTICE—PARTIES—PARTITION—PLAINTIFF OF UNSOUND MIND.

In *Porter* v. *Porter*, 37 Chy. D. 420, it was held that a partition action may be brought by a person of unsound mind by his next friend; but that the court at the trial ought not to act upon the request for sale made by such a plaintiff, without being first satisfied that the sale would be for his benefit. The case of *Halfhide* v. *Robinson*, 9 Chy. 373, in which James, L.J., said: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate," was considered by Cotton, L.J., only to mean that the course taken in that particular case was not proper, and that there should have been an application in lunacy.

SOLICITOR AND AGENT—COSTS—TAXATION OF PART OF BILL.

In re Johnson & Weatherall, 37 Chy. D. 433. London agents delivered to their country principal, a bill of agency charges which included a number of distinct actions and matters, in which they had acted as agents. The charges relating to each distinct action or matter, were made out separately under the head of that action or matter, though the whole of the charges were included in one bill. On an application by the principal to tax the charges relating to one of the actions only, North, J., held that the bill was one bill, and that the principal was not entitled to have part of it taxed; but the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), were of a different opinion, and held that though the taxation of a part of a bill could not be ordered under the Solicitors' Act, 1843, yet that the court, under its general jurisdiction, had power to order taxation of part of a bill, and that in this case it was right that such jurisdiction should be exercised, and taxation of the charges relating to the one action was therefore ordered on the principal undertaking to pay the balance claimed by the agents within a short time (subject to an undertaking to refund), and as the appellant had not previously offered this undertaking, he was ordered to pay the costs of the appeal, and the rule as to the result of one-sixth being taxed off was not to be followed.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION, DURATION OF—VENDORS' AND PURCHASERS' ACT—(R. S. O. c. 112, s. 3).

Perhaps the only points for which it is necessary to notice *In re Tippetts and Newbould*, 37 Chy. D. 444, are these, viz.: That it was held by the Court of Appeal that when on a sale of a married woman's interest in a leasehold vested in trustees, a question arose as to whether the property was subject to a restraint on anticipation, such a question could not be determined upon an application under the *Vendors' and Purchasers'* Act (R. S. O. c. 112, s. 3), because that was a question in which the purchaser was not interested; but the Court of Appeal (Lord Coleridge, C.J., and Cotton and Bowen, L.JJ.), permitted the application to be turned into an application for the construction of the will; and upon such application it determined (affirming Kay, J.), that when a fund subject to a particular estate is given to a married woman absolutely, but subject to a restraint on anticipation, such restraint is not, in the absence of any other ground, confined to the duration of the particular estate.

TRADE NAME—NEWSPAPER—INJUNCTION—EVIDENCE OF DAMAGE.

In *Borthwick* v. *Evening Post*, 37 Chy. D. 449, the plaintiff, the proprietor of the well-known London newspaper called *The Morning Post*, brought the action to restrain the defendants from calling a new paper established by them *The Evening Post*. Kay, J., granted the injunction; but the Court of Appeal (Lord Coleridge, C.J., and Cotton and Bowen, L.JJ.), being of opinion on the evidence, that though the conduct of the defendants in taking the name *Evening Post*, might be calculated to deceive the public into supposing that there was a connection between the two papers, yet that there was no probability that the plaintiff would be injured by such supposition, and therefore dismissed the action, but without costs, as the court considered the defendants guilty of dishonest conduct.

MORTGAGOR AND MORTGAGEE—RE-TRANSFER OF SECURITY ON REDEMPTION—BREACH OF TRUST.

In *Magnus* v. *Queensland National Bank*, 37 Chy. D. 466, the Court of Appeal (Lord Halsbury, L.C., and Cotton, and Bowen, L.JJ.), affirmed the decision of Kay, J., 36 Chy. D. 25, noted *ante* vol. 23, p. 364. It may be remembered that the action was brought by certain trustees against the defendants who had been mortgagees, to make them account for not having, on payment of their mortgage, re-transferred the securities held by them, so as to revest them in the parties from whom they had received them. By the defendant's action, the proceeds of the securities in question had got into the sole control of one of three trustees, who had misappropriated them, and the mortgagees were held bound to make good the loss thus sustained. It was attempted to be argued by the appellants, that if they had re-transferred the securities to the three trustees, the defaulting trustee would still have succeeded in defrauding the trust out of the money; but Bowen, L.J., said that that argument, reduced to its "bare bones," was like saying, "a man knocks one down in Pall Mall, and when I complain that my purse has been taken, the man says: "Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street."

EASEMENT CONVEYANCE—GENERAL WORDS—IMPLIED GRANT OF APPARENT EASEMENT.

Brown v. *Allabaster*, 37 Chy. D. 490, is a case of some importance on the law of easements. A parcel of land situate at the intersection of two streets called Park Road and Augusta Road, was owned by the same person, and he built three houses, A, B and C on it, fronting on Park Road; and in rear of the lot he made a lane, by which access would be had to Augusta Road from the gardens in rear of houses B and C. While the property was in this condition, he sold the houses B. and C. to the defendants, with their "rights, easements and appurtenances," but without expressly granting a right of way over that part of the lane in rear of house A, which was the corner house, and abutted on Augusta Road. He subsequently sold house A to the plaintiff, who claimed the right to stop up the lane in rear of his parcel. There was a means of access to the

gardens in rear of houses B and C from Park Road by a tiled passage, which, however, was only suitable for a foot way and not for vehicles. As Kay, J., points out, at the time of the grant to the defendants, owing to the unity of possession in their grantor, the way in question was not an easement, and the question between the parties was whether this way passed to the defendants as a way of necessity? and if it was not a way of necessity, could it be held to pass to the defendants by implied grant? On the first point, the learned judge was clear, that the right to the lane could not be maintained on the ground of its being a way of necessity, because of the existence of the tiled passage; but on the other point he was of opinion that the lane came under the head of an apparent and continuous easement, and passed by implied grant to the defendants. We may remark that in Gale on Easements, it is laid down that a right of way is not a continuous and apparent easement.

WILL—CONSTRUCTION—"PROPERTY AT MY BANK."

In re Prater Desinge v. *Beare*, 37 Chy. D. 481, the Court of Appeal (Lord Halsbury, L.C., and Cotton and Bowen, L.JJ.), reviewed the decision of Chitty, J., 36 Chy. D. 473, noted *ante* p. 70. The question at issue was the meaning of a bequest of "half my property at R.'s bank," there being at the time of the will, and of the death of the testator, a cash balance and also certificates of shares, some inscribed and some transferable by delivery at the bank named. Chitty, J., decided that only half the cash balance passed, but the Court of Appeal hold that half of the shares of which the bank held the certificates also passed.

COMPANY—WINDING UP—CONTRIBUTORY—AGREEMENT TO APPLY DEBT IN PAYMENT OF CALLS.

In re Land Development Association, 37 Chy. D. 508, will be of interest to those engaged in winding up proceedings. Kent was a shareholder of the company in liquidation, whose directors were empowered to receive from shareholders payment in advance for future calls. He had purchased a debt due by the company and applied to the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution authorizing this to be done, but no entries were made in the company's books for carrying the proposed transaction into effect. The company was subsequently ordered to be wound up, and it was held by Kay, J., that the resolution of the directors, not being followed up by any entry in the books of the company showing that the shares had been paid up, the transaction did not amount to payment in cash, and that Kent therefore remained liable for calls in respect of the shares, under sec. 25 of *The Companies' Act*, 1867, which provides that every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies, on or before the issue of such shares;" no such contract having been filed.

TRUSTEE ACT—APPOINTMENT OF NEW TRUSTEES—APPOINTMENT OF SEPARATE SET OF TRUSTEES FOR PART OF TRUST PROPERTY.

In re Moss's Trusts, 37 Chy. 513, Kay, J., held that, under the *Trustee Act*, 1850, s. 32, the court had power to appoint a separate set of trustees for part of the trust property held upon distinct trusts. He also ruled that a petition under the *Trustee Act* should state under which particular section of the Act the court is asked to act.

ADMINISTRATION—INTESTACY—PERSONALTY—GRANDCHILDREN—STATUTE OF DISTRIBUTIONS—(22 AND 23 CAR. 2, C. 10) SS. 3, 5, 6, 7.

In re Natt, Walker v. *Gammage*, 37 Chy. D. 517, is a case upon the construction of the *Statute of Distributions* (22 Car. 2, c. 10), and reveals the somewhat curious fact that the statement in *Williams* on Executors, 8th ed., vol. 2, p. 1503, to the effect that where the children of an intestate are all dead, and all of them have left children, all the grandchildren are entitled to an equal share *per capita*, is an incorrect statement of the law. The point, it seems, has been the subject of difference of opinion among the text-writers for some time past. In *Watkins* on Descents the same opinion is expressed as in *Williams;* but in *Burton's* Compendium, 7th ed., p. 438, the contrary view is stated, and this seems borne out by *Hargrave* in his Jurisconsult Exercitations, vol. 1, p. 271, and also by a note of Joshua Williams to *Watkins* on Descents. Considering the length of time the statute has been in force, and the many cases which must have arisen, it is certainly strange that the question of its proper construction on this point should, at this late day, be in doubt. North, J., as we have intimated, was of opinion that *Williams'* view is erroneous, and that where the next of kin are all grandchildren, or great grandchildren, they take *per stirpes* and not *per capita*.

ADEMPTION—BEQUEST OF BUSINESS—DOUBLE PORTIONS.

The only other case to be noted is *In re Vickers, Vickers* v. *Vickers*, 37 Chy. D. 525. In this case a testator had bequeathed his residue (including a business, which he directed to be sold) for the benefit of his children (two sons and three daughters) equally; and subsequently to the date of the will he assigned his business to his eldest son on trusts, which provided for the admission of the younger son as a partner on equal terms with the elder on his attaining full age; the repayment, with interest, to the testator of a sum temporarily loaned by him to the business; and the payment to the testator of a weekly sum for his life: and it was held by North, J., that the shares of the two sons in the residue were adeemed to the extent of the value of the property assigned in trust for them at the time of the assignment, which must be brought into account in the distribution of the residue.

Notes on Exchanges and Legal Scrap Book.

A NOVEL CASE OF NEGLIGENCE.—A novel case of negligence came before the Supreme Court of Louisiana in *Clairain* v. *Western Union Telegraph Company*. The following are the facts, as we learn from the *Albany Law Journal* "Clairain was employed by the company as a lineman in putting up wires on their telegraph poles. While he was engaged in this work some forty feet from the ground, it became necessary for him to force the steel spur, attached to one of his legs, into the post, throw his other leg around the pole, and lean outward on the cross-arm and wire at the end of it, for the purpose of tying the wire to the outer end of the arm. While he was in this position the wire broke near the cross-arm, the cross-arm itself broke where it was fastened to the telegraph pole and he fell headlong on the stones beneath, and received injuries from which he died in a few days, leaving a widow and three children. It was charged that the wire was of inferior quality, second-hand and full of kinks, that it had been so twisted as to weaken it, and that the cross-arm was of light material, too thin, improperly bored, and so brittle as to be utterly unfit for its purpose. It must be considered that the employment was a dangerous one; not dangerous in merely climbing or ascending the poles, and reaching out to the end of the cross-arms and fastening the wire, but dangerous from the fact that the wire and its wooden support might chance to be defective or unsound. These, necessary for his work, the employee had a right to presume were entirely safe, and he was entitled to rest on this presumption for his security: *Hanson* v. *Railway*, 38 La. Ann. 111. And it further follows that the employment being a dangerous one, as conceded and asserted by the defendant's counsel, the defendant company, the employer, should be legally held to the greatest care and diligence in the selection of the necessary materials, and everything else calculated to insure the safety of the employee in the prosecution of his work: *Black* v. *Railroad Co.*, 10 La. Ann. 38; *Railroad Co.* v. *Derby*, 14 How. 486. 'It is indispensable to the employer's exemption from liability to his servants for the consequence of risks thus incurred, that he should be free from negligence. He must furnish the servant with the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury results, he is liable to the servant as he would be to a stranger:'" *Railroad Co.* v. *Ross*, 112 U. S. 377.

Correspondence.

CASE LAW; OR, AUTHORITY v. *PRINCIPLE.*

TO THE EDITOR OF THE CANADA LAW JOURNAL:

The judgment rendered in the Division Court case, *Masson* v. *Wicksteed*, reported in the LAW JOURNAL of 16th March last, presents a humorous aspect, as showing how the whole machinery of the law may be diverted for several days, employing two County Court judges and two barristers; and detaining a whole host of fretting lawyers and witnesses, in order to decide judicially what any business man of fair intelligence and experience would have decided practically in a few minutes. This judgment, really rendered by two County Court judges of Ontario, residing in Ottawa, because their views thereon were known to coincide, furnishes also a melancholy example of the evils resulting from a long familiarity with technicalities rather than principles; evils springing from want of a sound training in the principles of the law, as well as case law; a training which would encourage reflection and give the power, and confer the habit of thinking and judging for one's self, and not relying blindly on the judgment of others; an education which would teach that cases in law when decided only establish principles, and not iron rules. *Revenons à nos moutons* or to the case of *Masson* v. *Wicksteed*, as decided lately by Judge Lyon, in the Division Court of Ottawa.

The defendant, president of an incorporated company, in obedience to a resolution of the Directors, draws a cheque in the form and manner usual to most companies, in favour of McCulloch, a former servant of the company, and post-dates it. Masson discounts the cheque; but when it is presented at the bank, the answer "no funds" is returned. Masson is paid cash by McCulloch, and the cheque is returned to McCulloch. McCulloch by his solicitor, Mr. Code, should then have sued the company on the cheque or for work and labour done, etc., because, irrespective of the manner in which the cheque was drawn out, the cheque had been accepted all through as being that of the company, by McCulloch, Code, Masson, the bank and the directors of the company.

But the company was virtually insolvent, and the president was a better bird to pluck; and so an action was brought against him personally.

The argument advanced in court and in chambers was as follows: "Several cases decide that a post-dated cheque is an inland bill of exchange; several cases declare that bills of exchange drawn by a company should have a particular usual form; this particular post-dated cheque has not that particular usual form; therefore it cannot be the company's cheque, therefore it must be the drawer's personal cheque."

The two Carleton county judges agreed as to the correctness of the above

argument; and one of them rendered judgment in accordance with the conclusions of the foregoing syllogism; whose premises are founded on decisions taken from various cases, without proper regard being paid to the difference existing between the facts disclosed in those cases and those proved in this particular case.

"It sometimes happens that the facts which are presented to the practitioner or court are the same which have occurred, and have been passed upon before. But this can be only when the parties have dropped out something from their recital, because of an instinctive feeling that it was unimportant. In truth, no two sets of facts were ever absolutely identical. Now, for a court to decide a question differing from what has gone before, it must take cognizance of the law engraved, not by man, but by God, on the nature of man. In other words, it must take cognizance of what our predecessors have named the unwritten law or common law. The law has already been discovered by judicial wisdom to consist of a beautiful and harmonious something, not palpable to the physical sight, yet to the understanding obvious and plain, called principle. And the only way in which it is possible for one decision to be a guide to another involving facts in any degree differing, is to trace the decision to its principle, and thence to pass downward to the new facts and inquire whether or not they are within the same principle. This process is termed reasoning."

"The judicial decision . . . is the conclusion of the judicial mind upon particular facts. . . . Even when the words of a judge are in the most general terms, and to the casual reading meant to convey absolute doctrine as viewed separately from the limited facts in contemplation, they are to be interpreted as qualified by those facts. The consequence is that judicial decisions do not and cannot formally settle any abstract doctrine, such as it is the province of jurists to lay down. The words of judges are always to be interpreted as qualified and limited by the facts of the case in hand; and it is thus even when in form general, as laying down doctrines for all classes of facts."

"Our books of reports are the judicial conclusions from just so many sets of narrow facts as there are cases in them, each set of facts differing from every other; and they do not embody the ultimate rules which govern the infinity of facts, past, present and future." (J. P. Bishop in *American Law Review*, Jan.-Feb., 1888.)

Let us consider the reason why cheques or bills of exchange are usually signed in a certain way on behalf of a company. It is this: "Cheques must be properly signed by a firm keeping account at a banker's, as it is part of the implied contract of the banker, that only cheques so signed shall be paid." (Bouvier's Dictionary.) In case of promissory notes or bills they must be signed in such a way as not to deceive the parties negotiating them. These parties must not be led to think they have a rich company as security for the payment, when they have in reality only a poor individual. In the case before us the cheque was the usual and acknowledged cheque of the company; no one was deceived or in ignorance of the facts; but then the individual defendant was comparatively rich, and the company absolutely poor. So that in order to have

the former condemned to pay, judgments which may have been correct when taken in connection with the cases in which they were rendered, were applied to this case, to which they had no relation. In this way a case which ought to have been decided, following the rule of non-appealable courts, according to equity and good conscience, was not so decided.

Had the judge received a good grounding in legal logic he would have said, after hearing the argument of Mr. Code, "There are three maxims of Civil Law which apply here: 1. *Consensus tollit errorem.* 2. *Modus et conventio vincunt legem;* and, 3. *Cessante ratione legis, cessat ipsa lex.* Mr. Wicksteed signed this cheque as an authorized person on behalf of the company, and was such to the knowledge of all parties to the cheque. It is the company's cheque." Action dismissed with costs, and a little advice to the plaintiff's attorney to study *Roman* law—which is written reason.

The letter killeth, the spirit giveth life. English, Roman and Christian interpretations of law agrees in this; the spirit, and not the letter, must be the rule of decision, and the spirit of a contract is the intention and understanding of the parties. Neither plaintiff nor defendant in the case before us intended or understood that the defendant should be personally liable on the note signed by the defendant for the company.

Judge Lyon says in effect by his judgment, everybody knows this to be the company's cheque, the company never repudiated it and is willing to pay it when called on; but I won't allow the company to be asked to pay. You are all wrong in thinking that *to be* which you know *is*, for I see that several decisions —in cases, to be sure, very different from this one, but then they are *decisions*— say that the defendant is personally liable; though it may seem contrary to equity and even to good conscience.

"Our judges, of course, are recruited from the bar, and a bad training for lawyers results in correspondingly poor judges. And, in defence of the crimes, or rather errors and mistakes, charged against judges, I must say that I am only surprised that they do not make more. A man cannot help being what he is, when, under the training he received, he could not have been anything else. And a lawyer who is trained, or trains himself, to a subserviency to precedents and authorities, will, if he reaches the bench, be, more or less, a slave to them still. And then when out of the mass of legal literature available, crude, undigested, confusing, contradictory and irreconcilable masses of law—or alleged law—are hurled at him by opposing counsel, is it any wonder that he should often make mistakes?" (George H. Christy, in CANADA LAW JOURNAL, 1 December, 1886.)

Blackstone foresaw the evils which would result from a case of apprenticeship and study in England, similar to what is now adopted in the Province of Ontario. He thus writes, at page 32 of his celebrated commentaries:—

"Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretell that the lawyer educated for the bar in subservience to attorneys and solicitors will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the

rules of practice should be founded, the least variation from established precedents will totally distract and bewilder him. *Ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn, *a priori*, from the spirit of the laws, and the natural foundations of justice."

"The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; and we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. The exercise of sound judgment is as necessary in the use as diligence and learning are requisite in the pursuit of adjudged cases." (Kent's Commentaries.)

The only method of arriving at this happy consummation so devoutly to be wished in Ontario, namely, that all barristers and judges shall be able to form and comprehend arguments drawn from the spirit of the laws and the natural foundations of justice, and for judges to give decisions in cases in conformity with such arguments, is, I think, to insist upon a full course and examination in the principles of law when studying for the profession.

Ontario is, in this respect, far behind England; the utility of a knowledge of Roman law, as law, is undeniable, forming, as it does, the basis of the laws of all Latin nations. Even the Common Law of England is greatly indebted for its vigour and philosophic accuracy to Justinian's Code.

In England, the examination which must be passed before a law student can be "called" is divided into two parts—the first being the Roman law, and the second in English law. He may take both at the same time, or he may take the Roman law first, but he cannot take the English law before the Roman. He may take the Roman law any time after he has kept four terms, but cannot take the English until he has kept at least nine terms. This is the only remedy for the present condition of affairs in the legal profession in Ontario. With the example of such a judgment as the one given by Judge Lyon before them, the Law Society of Upper Canada should take immediate steps to place Roman law in the law student's curriculum.

R. J. WICKSTEED.

DIARY FOR MAY.

1. Tues ...Supreme Court sittings. St. Philip and St. James.
2. Wed....Sup. Ct. of Can. sits. J. A. Boyd, 4th Chan., 1881.
6. Sun.....*5th Sunday after Easter.*
7. Mon....Lord Brougham died, 1868, æt 90.
8. Tues....Ct. of App. sits. Gen. Ses. and C. C. sit. for trials in York. 1st Inter. Exam.
10. Thur. ..2nd Inter. Exam. Ascension Day.
13. Sun.....*1st Sunday after Ascension.*
15. Tues ...Solicitors' Examination.
16. Wed....Barristers' Examination.
20. Sun.....*Whitsunday.*
21. Mon....L. S. Easter Term begins. H. C. J. sit. begin. Confederation proclaimed, 1867. Lord Lyndhurst born, 1772.
24. Thur. ..Queen Victoria born, 1819.
25. Fri. ....Princess Helena born, 1846.
27. Sun.....*Trinity Sunday.*
28. Mon....Battle of Fort George, 1813.
31. Thur. ..Parliament of U. C. first met at Toronto, 1797.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ELECTION CASE.

GLENGARRY CONTROVERTED ELECTION CASE.

Election petition—Ruling by judge at trial—Appealable—Dominion Controverted Elections Act—R. S. C. c. 9, ss. 32, 33 and 50—Construction of—Time—Extension of—Jurisdiction.

Present—SIR W. J. RITCHIE, C.J., and FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

Held, 1.—That the decision of a judge at the trial of an election petition overruling an objection taken by respondent, as to the jurisdiction of the judge to go on with the trial, on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada, under s. 50 (*b*), c. 9, R. S. C. GWYNNE, J., dissenting.

2. In computing the time within which the trial of an election petition shall be commenced, the time of a session of Parliament shall not be excluded, unless the court or judge has ordered that the respondent's presence at the trial is necessary. GWYNNE, J., dissenting.

3. The time within which the trial of an election petition must be commenced, cannot be enlarged beyond the six months from the presentation of the petition, unless an order has been obtained on application made within said six months.

An order granted on an application made after the expiration of the said six months is an invalid order, and can give no jurisdiction to try the merits of the petition, which is then out of court. RITCHIE, C.J., and GWYNNE, J., dissenting.

Appeal allowed with costs.

Blake, Q.C., and *Cassels*, Q.C., for appellant.

Macmaster, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

ELECTION CASE.

Court of Appeal.] [Jan. 10.

In re ALGOMA DOMINION ELECTION PETITION.

BURK *v.* DAWSON.

Elections—R.S.C. c. 9, ss. 32, 33, construction of—Time for trial of petition—Extending time.

The petition was presented on the 6th May, 1887, during a session of Parliament which ended on 23rd June, and issue was joined on 3rd June; no application was made or steps taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial, and to have the time for the commencement of the trial enlarged.

The first part of s. 32 of the Controverted Elections Act, R. S. C. c. 9, is as follows:—

"The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included."

Held, PATTERSON, J.A., dissenting, that the exception in the last clause is confined to a

case in which the court is satisfied that the respondent's presence is necessary; "such trial" refers to a trial at which the respondent's presence has been declared to be necessary; and no such declaration having been made in this case, the time of the session of Parliament was not to be excluded from the six months within which the trial was to be commenced.

It was not incumbent upon the respondent to move to dismiss the petition for default.

The court could not *nunc pro tunc* declare that the respondent's presence at the trial was necessary.

Per curiam, that the time for the commencement of the trial may be enlarged under s. 33, notwithstanding the expiration of the six months; but it had not been established in this case that the requirements of justice rendered such enlargement necessary; and the court refused to appoint a time and place for trial or to enlarge the time.

W. Cassels, Q.C., and *C. J. Holman*, for the petitioner.

McCarthy, Q.C., and *J. R. Roaf*, for the respondent.

JAMES *v.* ONTARIO AND QUEBEC RAILWAY COMPANY.

Expropriation of land—R. S. C. c. 109, *s.* 8—*Increase in value—Right to set off peculiar benefit.*

Held, affirming the judgment of FERGUSON, J., 12 O. R. 624, that in ascertaining the compensation to be made to a land-owner for land expropriated under R. S. C. c. 109, s. 8, the value of the part taken (as well as the increased value of the part not taken, which by sub-sec. 21 is to be set off), must be ascertained with reference to the date of the deposit of the map or plan and book of reference under sub-sec. 14 (or, in this case, with reference to the date of the notice or determination to expropriate), and, therefore, such value should include any increase which may have been caused by, or is owing to, the contemplated construction of the railway.

Semble, per BURTON, J.A., that what is intended by sub-sec. 21, is a direct or peculiar benefit accruing to the particular land in question, and not the general benefit to all land-owners resulting from the construction of the railway.

Per OSLER, J.A., the land in question not having been taken for the purposes of the railway strictly, but, after the same had been laid down for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway.

WILLS *v.* CARMAN.

Costs—Payment of to unsuccessful party—O. J. A. rule 428*—Nominal damages, power of court to give judgment for—Venire de novo.*

In an action for libel the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage thereby. The judge at the trial dismissed the action, but ordered the defendant to pay the plaintiff's costs, and gave the latter judgment therefor. The defendant thereupon moved in the Divisional Court against the judgment for costs, which that court varied by ordering the action to be dismissed with costs, and the plaintiff having appealed to this court from the judgment at the trial, dismissing the action, as also from the judgment of the Divisional Court.

Held, that although rule 428, gives to the judge or court the power of depriving any of the parties to an action, plaintiff or defendant, of their costs, it does not confer the power of compelling a successful party to pay the costs of an unsuccessful party; *Mitchell* v. *Vandusen*, 14 A. R. 517, considered, approved and followed.

Held, also, allowing the appeal of the plaintiff from the judgment at the trial, that a *venire de novo* should be awarded to the court. (PATTERSON, J.A., dissenting from such direction.)

Per HAGARTY, C.J.O., and GALT, J.—No court has or ought to have the right to direct *ex propreo motu* judgment for nominal damages where a jury has refused to award them.

Per OSLER, J.A.—Nominal damages should not be added, unless it clearly appear that such damages are a mere matter of form, or that the omission to find them was accidental or unintentional, or an oversight following a distinct intention to find the plaintiff's cause of action proved.

Per PATTERSON, J.A.—The jury having left no fact undetermined, the plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs.

ERICKSON *v.* BRAND.

Malicious arrest—Capias ad respondendum—Necessity to set aside before bringing action—Reasonable and probable cause—Duty of judge.

In an action for malicious arrest on the ground of want of reasonable and probable cause, to enable the plaintiff to recover it is not necessary to show that the *ca. re.*, or the judge's order on which the same was obtained, has been set aside.

The defendant in his application for an order for the *ca. re.* by his affidavit made out a *prima facie* case, but certain facts and circumstances, which it was alleged he was aware of, were omitted therefrom, and which, it was contended, might, if stated, have satisfied the judge granting the order, that, although the plaintiff was about to depart from the Province, it was not with *intent* to defraud, etc. At the trial the judge decided the question of reasonable and probable cause, without leaving to the jury any question as to whether the statements in the defendant's affidavit fairly stated the case.

Held, that before deciding on the question of reasonable and probable cause, the judge should have seen that the facts on which he ruled, were either proved without contradiction, or admitted or found by the jury.

Burton, J.A., dissentiente.

Patterson, J.A., dubitante.

HIGH COURT OF JUSTICE FOR ONTARIO.

Chancery Division.

Boyd, C.] April 9.

HARRISON *v.* SPENCER.

Will—Period of distribution—Thellusion's Act—39-40 *Geo. III. c.* 9.

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be equally distributed amongst the testator's nephews and nieces who should be alive at the time of his death. At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died.

Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who died should die before the said period of distribution in favour of their representatives, who were entitled to take in substitution for the original legatees, and for this reason it was to be inferred that by heirs at law the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

Held, also, that the Act against accumulations, commonly called the Thellusion Act, 39-40 Geo. III. c. 9, which was passed after the Statute, 32 Geo. III. c. 1, by which English law was introduced into Canada, and which did not extend in terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that Statute.

Ferguson, J.] [Mar. 15.

BARBEAU *v.* THE ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways and Railway Companies—Expropriation of lands—Dominion Railway Act or Provincial Railway Act—Work for general advantage of Canada—Notice.

In an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a county judge for a warrant for possession of certain lands required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served, as required by the provisions of the Ontario Railway Act.

Held, under the circumstances of this case, and following *Clegg* v. *The Grand Trunk Railway Company*, 10 O. R. 713, and *Darling* v. *The Midland Railway Company*, 11 P. R. 32, that the defendants were no longer within the operation of the Ontario Statutes.

Held, also, that a notice requiring the lands given under the Dominion Railway Act was not a sufficient notice under the Provincial Railway Act.

Robinson, Q.C., and *Collier*, for the plaintiff. *Aylesworth* and *Towers*, for the defendants.

Boyd, C.] [April 9.

ST. THOMAS *v.* CREDIT VALLEY RAILWAY.

Contract—Damages for breach—Railways—Failure to run trains to point contracted for.

An appeal from the report of the Master at London, assessing the damages which the plaintiffs were entitled to for breach by the defendants of their agreement to establish a station at Church Street, in the west end of the city of St. Thomas, and run trains from their station in the east end of the city to the said station at Church Street.

Held, that the matter must be referred back, as the law and evidence did not warrant the conclusion to which the Master had come. The failure to keep up the station at Church Street might have, and might be expected to have, the effect of rendering property in that neighbourhood less desirable than it would otherwise be; and though the actual depreciation is a matter which pertains to the property owners and not to the city as damages, yet the lessened taxation resulting from this depreciation is not too remote a fact for consideration upon the reference.

It is clear that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station at Church Street, or the actual depreciation in value of the land individually owned in that neighbourhood, could not be reckoned as constituents *per se* of the damages suffered by the corporation.

Stated broadly, the inquiry was, how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued, and the difficulty of ascertaining the amount was not a reason for withholding relief altogether.

If the Company admitted that the station on Church Street was to be given up for all future time, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. The loss in taxation resulting to the city from the depreciation in taxable property which could be traced to, or reasonably connected with, the Company's default, formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs are entitled.

Dalton McCarthy, Q.C., and *Ermatinger*, Q.C., for the plaintiffs.

C. Robinson, Q.C., and *Wells*, for the defendants.

Boyd, C.] April 23.

HEFFERMAN *v.* TAYLOR.

Will—Life tenant—Power to rent—Trustees.

A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during life for her support.

Held, that the wife had the right to rent the farm and deal herself directly with the tenant during her life. In this case, those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant.

Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee.

Practice.

Mr. Dalton.] [April 17.

MORROW *v.* CHEYNE.

Pleading—Action for malicious prosecution—Observations of judge at trial of criminal charge—Publication of charge.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from the publication of such charge in newspapers and otherwise, was allowed to stand.

C. Millar, for the plaintiff.

Shepley, for the defendant.

Boyd, C.] [April 23.

Re BROOKFIELD AND SCHOOL TRUSTEES OF SECTION 12, TOWNSHIP OF BROOKE.

Mandamus—Motion for in court or chambers—Costs—O. J. Act, s. 17, ss. 8—R. S. O. (1877), c. 52, s. 17.

Sec. 17, sub-sec. 8, of the O. J. Act, applies to motions for *mandamus*, etc., where an action is pending; but R. S. O. (1877), c. 52, s. 17, specially authorizes a summary application for a *mandamus* in chambers.

Kincaid v. *Kincaid*, *ante* p. 217, distinguished.

And where a summary application for a *mandamus* was made to the court, costs as of a chambers application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong.

Snelling, for the applicant.

F. E. Hodgins, for the respondent.

Galt, C. J.] [April 5.

SWAIN *v.* STODDART.

Security for costs—Interpleader issue—Local judge, jurisdiction of.

A local judge, in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed.

Coulson v. *Spiers*, 9 P. R. 49, followed.

A party to an interpleader issue may be ordered to give security for costs.

The dictum of the Master in Chambers in *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121, not approved.

Williams v. *Crosling*, 3 C. B. 956, followed.

Aylesworth, for the plaintiff.

C. J. Holman, for the defendant.

Boyd, C.] [May 8.

HUFFMAN *v.* DONER.

Judgment—Combined interlocutory and final—Rules 72, 75.

Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; rules 72 and 75 may be combined in a proper case, and justify such a judgment.

Bissett v. *Jones*, 32 Chy. D. 635, followed in preference to *Standard Bank* v. *Wills*, 10 P. R. 159.

Middleton, for plaintiff.

W. M. Douglas for defendant.

MARITIME COURT OF ONTARIO.

McDougall, J.]

THE "HECTOR."

THOMAS PRINGLE, *petitioner.*

SCHUMAN & WELLER, *respondents.*

Jurisdiction of the court — Registration — Vessels—Application of the Statutes.

The "Hector" was a common pleasure boat on Lake Ontario, of about three tons burthen, twenty-five feet long, seven feet beam, two and a half feet deep, and unregistered. The defendant, Schuman, was master of the vessel. The plaintiff alleges an agreement between Ezra H. Pringle and the defendants, that the former should have a half interest in the boat and its earnings, and that this half interest was assigned by Ezra H. Pringle to the plaintiff, who now sets up his claim to a half interest in the boat and its earnings, and asks that an account be

taken of money received and expended. He also prays for a sale of the boat and payment of his claim out of the proceeds. The defendants deny all knowledge of the boat as the "Hector," and deny the alleged agreement with Ezra H. Pringle, and allege that the defendant, John L. Weller, is the sole owner. They say the boat is not propelled by steam, has not a whole or fixed deck, is not constructed for voyaging on large bodies of water, but only for coasting, is unregistered, and has never been known by any distinctive name. They contend that the *res* is not a "ship" or "vessel" within the meaning of any Act giving jurisdiction to the court, and that, consequently, the court has no jurisdiction as to ownership or earnings: 26 & 27 Vict. c. 24, s. 10, and the Maritime Court Act of Ontario, were cited for the defendants. They also cite the "Australasia" and *Lepraque* v. *Burrows*, 13 Privy Council cases 132, and the Admiralty Court Act, 1861, s. 8. For the plaintiff it was contended that no vessel under fifteen tons need be registered, and that the court has jurisdiction over unregistered vessels so long as the vessels are ships within the meaning of the Maritime Act: *Ex parte Ferguson*, L. R. 6, Q. B. 280; s. 19, of the Act; and the "Oscar Wild" before SENKLER, J., at St. Catharines; also the Vice-Admiralty Act, s. 10, ss. 9, and the Maritime Court Act of Ontario, s. 14, ss. 3, were referred to.

Held, that the *res* mentioned in the petition is not a registered ship within the meaning of the Vice-Admiralty Courts Act, and, therefore, the jurisdiction of the court does not extend to a vessel of her class. There is, therefore, no jurisdiction to entertain the claim.

Tytler, for petitioner.

Ketchum, for defendants.

SUPREME COURT OF PRINCE EDWARD ISLAND.

QUEEN *v.* WOODS.

Application for certiorari—Summary Convictions Act—Form of information—Evidence of the substance of the charge—Issue of warrant.

This was an application on behalf of the defendant for a *certiorari* to remove a conviction of the stipendiary magistrate of the city of Charlottetown, for a violation of the Canada Temperance Act, into the Supreme Court.

The defendant was arrested on a warrant in the first instance upon the information of D. H., the public prosecutor. The information was in the form prescribed by the Summary Convictions Act, and sworn to.

It was contended on behalf of the defendant, that the Summary Convictions Act requires the matter of the information to be substantiated on oath before a warrant to arrest can issue in the first instance, and that the mere swearing to the information which only contains a just cause to suspect and believe, is not sufficient—but that it requires other evidence, such as a witness swearing to the actual commission of the offence charged, in order to substantiate the matter on oath.

Held, that the information as in form prescribed by the Act, and sworn to by the informant, is sufficient for the issue of a warrant in the first instance, and that the rule for *certiorari* be discharged, with costs against the applicant.

Peter, J., dissenting.

Hodgson, Q.C., for rule.

Davis, Q.C., contra.

Law Students' Department.

The following questions were asked at the English examination for call to the bar preceding Hilary Term, 1888. The answers are taken from the *Bar Examination Journal*. They will give students a good general idea of the kind of examination set for call to the English bar, and also of the style of answers which should be given.

COMMON LAW.

Pass Paper.

Q.—1. Enumerate the principal preliminary matters with regard to which a person conceiving himself to be aggrieved should satisfy himself before safely resorting to the remedy of an action at law.

A.—The principal preliminary matters with regard to which he should satisfy himself before commencing an action relate to—(*a*) the

cause of action; (*b*) notice of action; (*c*) the nature of the relief to be claimed; (*d*) in which Division of the High Court to sue; (*e*) the parties to the action; and (*f*) the defendant's place of residence.

(*a*) The cause of action—whether there will be a legal ground of claim at the time of commencing the action; *e.g.*, in the case of a claim under a contract, whether the time at which the promise was to be performed has arrived; or, in the case of a sale of goods for the price of ten pounds or upwards, whether the requirements of sec. 17 of the Statute of Frauds have been complied with prior to the commencement of the action—also whether the cause of action, supposing it to have once existed, has not been extinguished, as by an accord and satisfaction, or merger, or release, or barred by the Statute of Limitations.

(*b*) As to giving notice of intention to sue—whether the case is one in which notice is requisite, as if it be an action against a justice of the peace for something done by him in the execution of his office.

(*c*) As to the nature of the relief to be sought—as whether damages shall be claimed, or an injunction, or relief of both these kinds.

(*d*) As to the Division of the High Court in which the action shall be brought—whether it is one of those that, under the Judicature Act, 1873 (s. 34), must be brought in a particular Division.

(*e*) The parties to the action—as whether the right to sue is vested in himself solely, or in himself and others jointly, and whether the action should be brought against all of several persons, or against some or one of them only.

(*f*) The place of residence of the party intended to be sued—whether he is residing beyond the jurisdiction, and, if so, whether the claim is one in respect of which leave to issue a writ for service out of the jurisdiction can be given.

Q.—2. By whom are jurors summoned? Distinguish between the functions and qualifications of jurors in early days of English history and at the present time. Can either party to an action take any objection, and how, to the jurors?

A.—Jurors are summoned by the sheriff. In early times jurors were merely witnesses who spoke from knowledge with reference to to the facts in issue. They were accordingly selected for the very reasons which would now argue their unfitness, viz., their personal acquaintance with the parties and the merits of the cause. Either party may take objection to the jurors or any of them, by challenge to the array or to the poll. (Broom, C. L., bk. 1, c. 4.)

Q.—3. What are the principal rules as to payment of money into court by a defendant in an action?

A.—Money can be paid into court in any action to recover a debt or damages. It may be paid in before, or at the time of, delivering the statement of defence, or at any later time by leave of the court or a judge. It operates as an admission of liability, unless the liability be denied in the defence. But in actions for libel or slander payment into court cannot be accompanied by such denial. Whether the liability be admitted or denied, the plaintiff may accept in satisfaction of his claim the sum paid in; and even though he do not accept it in satisfaction, he may have the money paid to him at once, unless the liability has been denied in the defence, in which case the money remains in court till the court orders it to be paid out. (Ord. XXII., rr. 1–6.)

Q.—4. What are the principal characteristics of a contract under seal as distinguished from one that is not? and is there any qualification of the doctrine of estoppel by deed? What is the principal authority on the subject of such qualification?

A.—The following are the principal characteristics of the contract under seal, as distinguished from a contract not under seal:—(1) A consideration for the promise is not essential to the validity of the contract. (2) The parties to the contract, and those claiming under them, are estopped from denying the truth of the statements contained in the contract. (3) The contract operates as a merger of any simple contract in respect of the same matter. (4) The right of action on the contract is not barred by the Statute of Limitations until the expiration of twenty years from the time such right accrued. (5) The heir or devisee of the promisor may be sued at law on the contract, and is liable thereon to the extent of the value of the real estate descended or devised to him; the promisee being entitled to this remedy independently of that given by the statute 3 & 4 Will. IV., c. 104, which makes the lands of a deceased debtor liable to be admin-

istered in equity for payment of his debts generally. (6) A contract under seal can be altered or discharged only by another deed or by some act of as high a nature, so far as regards its effects at law, though in equity it may be discharged by parole agreement. Formerly, on the death of a person, his debts due by contract under seal were payable in priority to his simple contract debts; but this priority was abolished by statute (32 & 33 Vict. c. 46) in the year 1869.

The doctrine of estoppel by deed is subject to this qualification—that it does not preclude a party to the deed from showing that it is void or voidable on the ground of illegality, fraud, mistake, duress, or disability of the contracting party. In the case of *Collins* v. *Blantern* (1 Smith's Leading Cases, 369) is a leading authorit on this subject.

Q.—5. What are the contracts respectively of the drawer, the acceptor, and the indorser of a bill of exchange? What is notice of dishonour of a bill, and under what circumstances may it be dispensed with? What is an acceptor precluded from denying to the holder in due course of a bill?

A.—The drawer of a bill of exchange, by drawing it, engages that on due presentment it shall be accepted and paid, and that if it be dishonoured he will compensate the holder, or any endorser who is compelled to pay it, provided the necessary proceedings on dishonour be taken. The acceptor, by accepting, engages that he will pay the bill, according to the tenor of his acceptance. The indorser, by indorsing the bill, engages that on due presentment it shall be accepted and paid according to its tenor, and if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are taken. (Bills of Exchange Act, 1882, ss. 54, 55.)

Where a bill of exchange has been duly presented for payment, and the acceptor has failed to pay it, the holder of the bill, if he wish to make the drawer or endorsers, or any of them, liable for the amount of the bill, must give prompt notice of its non-payment to such of them as he intends to make liable; or, at least, must give notice to the party whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession. This is called *notice of dishonour;* and, as a general rule, the holder cannot sue any party to the bill (other than the acceptor) who has not received such notice either from the holder or from one of the other parties to the bill. Notice of dishonour to a drawer or indorser may be dispensed with, however, where the acceptor, as between himself and such drawer or indorser, is under no obligation to pay the bill, as where it has been accepted for the accommodation of the drawer or indorser; and in some other cases. (See Bills of Exchange Act, 1882, s. 50.)

The acceptor is precluded from denying to the holder in due course of a bill the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the bill, and (if the bill is payable to his order) his capacity to indorse it; and, if the bill is payable to order of a third person, the existence of the payee and his capacity to indorse. (Bills of Exchange Act, 1882, s. 54.)

Q.—6. Have the public the right to assume an authority to any and what extent in a partner to bind his partners upon contracts? What are the principal provisions of the Act, 28 & 29 Vict. c. 86, to amend the Law of Partnership?

A.—The public have the right to assume an authority in each partner in a firm to bind the partners jointly upon contracts within the ordinary limits of the partnership business.

The following are the principal provisions of the Act referred to in the question:—A loan of money to a trader, upon a contract in writing that the lender shall receive a rate of interest varying with the profits, or a share of the profits, of the borrower's trade, shall not *per se* constitute the lender a partner with the borrower, or render him liable as such. A contract for the remuneration of a trader's agent or servant by a share of the profits of the trade, shall not *per se* render the servant or agent responsible as, or give him the rights of, a partner. The payment of a portion of the profits of a business to the widow or child of a deceased partner therein, by way of annuity, shall not render such widow or child a partner in the business, or liable as such. The receipt by a person of a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, shall not *per se* render him a partner in the business, or liable as such, But if the borrower in the first

of such cases, or the purchaser of the goodwill in the last, becomes bankrupt, or compounds with his creditors, or dies insolvent, the lender in the first case, and the vendor in the last, is not to receive any part of the amount due to him till the other creditors have been paid in full.

(To be continued.)

Miscellaneous.

RULES OF THE SENATE TOUCHING DIVORCE.

Rules, Orders and Forms of Proceedings of the Senate of Canada touching Bills of Divorce and Procedure thereon, adopted by the Senate, on Wednesday, 11th April, 1888.

A

At every Session of Parliament a Committee of nine Senators shall be appointed by the Senate, to be called "The Select Committee on Divorce," to whom shall be referred all Petitions and Bills for Divorce, and all matters arising out of such Petitions and Bills, and no reference to any Committee other than the said Committee shall be necessary with respect to such Petitions, Bills and matters.

The Committee, unless it be otherwise ordered by the Senate, shall meet on the next sitting day after their appointment and choose their chairman, and five of the Senators on such Committee shall constitute a quorum.

All questions before the Committee shall be decided by the majority of voices, including the voice of the Chairman, who shall have no casting vote.

B

Notice of the day, hour and place of every sitting of the said Committee shall be given by affixing the same in the lobby of the Senate not later than the afternoon of the day before the time appointed for such sitting.

One of the Official Reporters of the Senate, when notified by the Chairman, shall be in attendance at the sittings of the said Committee, and shall take down in shorthand and afterwards extend the evidence of witnesses examined before the Committee, and cause the same to be printed.

C

Evidence taken before the said Committee shall be printed apart from the Minutes of Proceedings of the Senate, and only in sufficient numbers for the use of Senators and Members of the House of Commons, that is to say, one copy for distribution to each Senator and Member, and twenty-five copies to be kept by the Clerk of the Senate for purposes of record and reference.

D

Every applicant for a Bill of Divorce shall give notice of his or her intended application, and shall specify therein from whom and for what cause such divorce is sought, and shall cause such notice to be published during six months before the presentation of his or her petition for the said Bill, in the *Canada Gazette* and in two newspapers published in the District in Quebec, Manitoba, British Columbia or the North-West Territories, or in the County or Union of Counties in other Provinces, wherein such applicant usually resided at the time of the separation of the parties; but if the requisite number of papers cannot be found therein, then in an adjoining District or County or Union of Counties. Notices given in the Provinces of Quebec and Manitoba are to be published in one English and one French newspaper, if there be such newspaper published in the District, but otherwise shall be published in each newspaper in both languages. The notice may be in the subjoined form. If a notice given by any Session of Parliament is not completed in time to allow the petition to be dealt with during that Session, the petition may be presented and dealt with during the next ensuing Session, without any further publication of such notice.

E

A copy of the said notice shall, not less than one month before the date of the presentation of the Petition, at the instance of the applicant, be served personally on the person from whom the divorce is sought, when that can be done. If the residence of such person is not known or personal service cannot be effected, then, if, on report of the Committee as hereinafter provided for, it be shown to the satisfaction of the Senate that all reasonable efforts have been made to effect personal service and, if unsuccessful, to bring such notice to the knowledge of the person from whom the divorce is sought, what has been done may be deemed and taken as sufficient service.

F

No petition for divorce shall be received after the first thirty days of each session.

G

The petition of an applicant for divorce must be fairly written and must be signed by the Petitioner, and should briefly set forth the marriage, when, where and by whom the ceremony was performed, the grounds on which relief is asked and the nature of the relief prayed, and should also negative condonation, collusion and connivance. The allegations of the petition must be verified by declaration of the Petitioner, under the Act Respecting Extra-Judicial Oaths.

H

The applicant shall deposit with the Clerk of the Senate, eight days before the opening of Parliament, a copy, in the English or French language, of the proposed Bill of Divorce, and therewith a sum sufficient to pay for translating and printing 600 copies thereof in English and 200 copies in French. The translation shall be made by the translators of the Senate, and the printing shall be done by the contractor.

No petition for a Bill of Divorce shall be presented unless the applicant has paid into the hands of the Clerk of the Senate the sum of two hundred dollars ($200), towards expenses which may be incurred during the progress of the Bill, and the said sum shall be subject to the order of the Senate.

I

The petition when presented shall be accompanied by the evidence of the publication of the notice as required by Rule D, and by declaration in evidence of the service of a copy thereof as provided by Rule E, and by a copy of the proposed Bill. The petition, notice, and evidence of publication and service, the proposed Bill, and all papers connected therewith shall thereupon stand as referred, without special order to that effect, to "The Select Committee on Divorce."

J

It shall be the duty of the Committee to examine the notice of application to Parliament, the Petition, the proposed Bill, the evidence of publication and of the service of a copy of said notice, and all other papers referred therewith, and if the said notice, petition and proposed Bill are found regular and sufficient, and due proof has been made of the publication and service of the said notice, the Committee shall report the same to the Senate.

If any proof is found by the Committee to be defective, the Petitioner may supplement the same by statutory declaration to be laid before the Committee.

The Committee may, if the circumstances of the case seem to require it, recommend a particular mode for service of a copy of the Bill upon the party from whom the divorce is sought, before the second reading of the Bill.

K

Upon the adoption of the Report of the Committee, the Bill may be introduced and read a first time.

L

The second reading of a Bill of Divorce shall not take place till after fourteen days from the adoption of the Report of the Committee, and a notice of the second reading shall be affixed to the door of the Senate during that period.

A copy of such notice and of the Bill shall, at the instance of the Petitioner, be served personally, if practicable, on the party from whom the divorce is sought, or served in such other manner as may have been prescribed on Report of the Committee, and proof of such service shall be adduced before the Committee, who shall report thereon to the Senate.

Upon the adoption of the Report of the Committee as to the sufficiency of such service the Bill may be read a second time.

M

When the Bill is read a second time it shall be referred to the Select Committee on Divorce, who shall proceed with all reasonable despatch to hear and enquire into the allegations set forth in the preamble of the Bill, and take evidence touching the same, and the right of the Petitioner to the releif prayed.

The Committee, after such hearing and enquiry, shall report thereon to the Senate, and such Report shall be accompanied by the testimony of the witnesses examined, and by all papers and instruments put in evidence before the Committee. The minority may bring in a report stating the grounds upon which they dissent from the Report of the Committee.

When any alteration in the preamble or otherwise in the Bill is recommended, such alterations and the reasons for the same shall be stated in the Report.

When the Committee report that the preamble of the Bill has not been proved to their satisfaction, the Report shall state the grounds on which they have arrived at such a decision, and no Divorce Bill so reported upon shall be placed on the Orders of the Day, unless by special order of the Senate.

N

The Chairman of the Committee shall sign, with his name at length, a printed copy of the Bill, on which the amendments recommended shall be fairly written, and shall also sign, with the initials of his name, the several amendments made and clauses added in Committee; and another copy of the Bill with the amendments written thereon shall be prepared by the Clerk of the Committee and filed, or attached to the Report.

O

If adultery be proved, the party from whom the divorce is sought may nevertheless be admitted to prove condonation, collusion, connivance, or adultery on the part of the Petitioner.

Condonation, collusion or connivance between the parties is always a sufficient ground for rejecting a Bill of Divorce, and shall be enquired into by the Committee. And should the Committee have reason to suspect collusion or connivance, and deem it advisable that fuller enquiry should be made, the same shall be communicated to the Minister of Justice, that he may intervene and oppose the Bill should the interest of public justice, in his opinion, call for such intervention.

P

The applicant for divorce, as well as the party from whom the divorce is sought, may be heard before the Committee by counsel learned in the law of the Bar of any Province in Canada.

Q

The applicant for divorce, as well as the party from whom the divorce is sought, and all other witnesses produced before the Committee shall be examined upon oath, or upon affirmation in cases where witnesses are allowed by the law of Canada to affirm; and the Rules of evidence in force in Canada in respect of indictable offences shall, subject to the provisions in these Rules, apply to proceedings before the said Committee, and shall be observed in all questions of fact.

R

Summonses for the attendance of witnesses and for the production of papers and documents before the Senate or the Select Committee on Divorce shall be under the hand and seal of the Speaker of the Senate, and may be issued at any time to the party applying for the same by the Clerk of the Senate. Such summonses shall be served, at the expense of the party applying therefor, by the Gentleman Usher of the Black Rod or by anyone authorized by him to make such service. The reasonable expenses of making such service, and the reasonable expenses of every witness for attending in obedience to such summons shall be taxed by the Chairman of the Committee.

S

In case any witness upon whom such summons has been served refuses to obey the same, such witness may, by order of the Senate, be taken into custody of the Gentleman Usher of the Black Rod, and shall not be liberated from such custody except by order of the Senate and after payment of the expenses incurred.

T

In cases not provided for by these Rules, the general principles upon which the Imperial Parliament proceeds in dissolving marriage and the general principles of the rules, usages and forms of the House of Lords in respect of Bills for Divorce may be applied to Divorce Bills before the Senate and before the Select Committee on Divorce.

U

Declarations allowed or required in proof may be made under the Act of the Parliament of Canada entitled "An Act Respecting Extra-Judicial Oaths," before any judge, justice of the peace, public notary, or other functionary authorized by law to administer an oath.

V

Rules 72 to 84, both inclusive, are hereby rescinded; but all other rules of the Senate which, by reasonable intendment, are applicable to proceedings in divorce, shall, except in so far as altered or modified by these Rules, or inconsistent therewith, continue to be applicable to such proceedings.

W

The subjoined forms, varied to suit the circumstances of the case, or forms to the like effect, may be used in proceedings for divorce.

FORMS.

"A"

NOTICE OF APPLICATION FOR DIVORCE.

Notice is hereby given that (*name of applicant in full*) of the of , in the county (*or district*) of , in the Province of , (*here state the addition or occupation, if any, of applicant*), will apply to the Parliament of Canada, at the next session thereof, for a Bill of Divorce from his wife (*or her husband*), (*here state names in full, residence or addition or occupation, if any, of the person from whom the divorce is sought*), on the ground of (*adultery, adultery and desertion, or as the case may be*).

Dated at .
Province of } *Signature of applicant or of solicitor for applicant.*
day of 188 .

(*When any particular relief is to be applied for, the nature thereof shall be briefly indicated in the notice*).

"B"

DECLARATION AS TO SERVICE OF NOTICE WHEN MADE PERSONALLY.

Province of
County (*or district*) of } I, A.B., of the of in the county (*or district*) of , in the Province of (*occupation*) do
To Wit:

solemnly declare:—

1. That on the day of , A.D. 188 , I personally served C. D. (*names of persons served*) with a true copy of the notice hereto attached and marked "A," by giving the said copy to and leaving it with the said C. D. at (*state place of service.*)

2. That I know the said C. D., and that I believe him to be the person described in the said notice as the husband of E. F. therein named.

(*Add any statements made by C. D. to the person effecting the service showing identity.*)

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Act Respecting Extra-Judicial Oaths.

Declared before me, at the of in the county of , in the Province of this day of A.D. 188 . } *Signature of declarant.*

NOTE.—*Exhibits attached to the declaration should be verified under the hand of the public functionary before whom the declaration is made.*

"C"

GENERAL FORM OF PETITION.

To the Honourable the Senate of Canada in Parliament assembled,

The petition of A. B., of the of , in the County of , in the Province of , the lawful wife of, C. D. of, etc. (*State names in full, residence and occupation.*)

HUMBLY SHEWETH:

1. That on or about the day of , A.D. 18 , your petitioner, then A. X. (*spinster, or as the case may be*) was lawfully married to the said C. D. at .

2. That the said marriage was by license duly obtained (*or as the case may be*) and was celebrated by .

3. That at the time of the said marriage your petitioner and the said C. D. were domiciled in Canada, and have ever since continued to be and are now domiciled in Canada.

(*All facts as to the residence and domicile of the parties at and since their marriage should be stated with particularity.*)

4. That after her said marriage your petitioner lived and cohabited with her said husband, at , and that there are now living issue of the said marriage children, viz.: Mary D., born the day of , 18 , and Elizabeth D., born the day of , 18 .

5. That on or about the day of , A.D. 18 , at the in the , the said C. D. committed adultery with one G. H. of , spinster, and since then on divers occasions has committed adultery with the said G. H.

6. That your petitioner ever since she discovered her said husband had committed the said adultery has lived separate and apart from him, and the said C. D. has not since cohabited with your petitioner.

7. That your petitioner has not in any way condoned the adultery committed by the said C. D., and that no collusion or connivance exists between myself and the said C. D. to obtain a dissolution of our said marriage.

Your petitioner therefore humbly prays:

That your Honourable House will be pleased to pass an Act dissolving the said marriage between your petitioner and the said C. D., and enabling your petitioner to marry again, and giving to your petitioner the custody of the said Mary D. and Elizabeth D. and granting your petitioner such further and other relief in the premises, as to your Honourable House may seem meet.

And as in duty bound your petitioner will ever pray.

Signature of Petitioner.

"D"

DECLARATION VERIFYING PETITION.

Province of County (*or District*) of To wit: } I, A. B., of the of , in the County of , in the Province of (*occupation, if any. In the case of the wife being the applicant, say "wife of C. D." and gives names, residence and occupation or addition of the husband*), the petitioner in the foregoing petition named, do solemnly declare:—

1. That, to the best of my knowledge and belief the allegations contained in the paragraphs of the foregoing petition, numbered respectively are, and each of them, is true.

2. (*If any matter is alleged, of which the petitioner has not personal knowledge, add "That with respect to the matter alleged in the paragraphs of the foregoing petition, numbered respectively , I am credibly informed and believe them, and each of them, to be true."*)

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*Act respecting Extra-Judicial Oaths.*"

(*Sig. of Declarant.*)

Declared before me, at the of , in the County of , in the Province of , day of A.D. 188 .

True copy of the foregoing Rules as adopted by the Senate of Canada, Wednesday, the eleventh of April, A.D. 1888.

EDOUARD J. LANGEVIN,
Clerk of Senate.

Appointments to Office.

SHERIFF.

District of Muskoka.

James W. Bettes, Huntsville.

LOCAL REGISTRAR, CLERK OF DISTRICT COURT, ETC.

Muskoka and Parry Sound.

Richard H. Stewart, Parry Sound, Local Registrar, H.C.J., at Parry Sound, Clerk of the District Court, and Deputy Registrar of the Surrogate Court for the United District.

DEPUTY CLERK AND DEPUTY REGISTRAR.

Muskoka.

Isaac Huber, Bracebridge, Deputy Clerk of the District Court, and Deputy Registrar of the Surrogate Court.

CORONER.

Simcoe.

Wm. L. Allen, M.D., Phelpston.

DIVISION COURT CLERKS.

Simcoe.

David Lloyd, Newmarket, Second Division Court, *pro tempore*, *vice* H. W. Manning, deceased.

Nipissing.

Thomas J. Ryan, McKim, Fourth Division Court, *vice* Wm. B. Aird, left the jurisdiction.

BAILIFF.

Frontenac.

William J. McGrath, First Division Court, *vice* Michael Furlong, deceased.

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COMMISSION OF REAL ESTATE AGENTS.

THE real estate agent is of comparatively recent origin. Formerly, when a land-owner wished to dispose of his landed property, and desired to be free from the trouble of personally attending to its sale, he left the business in the hands of his solicitor, and the latter found the purchaser, and carried the matter to completion. Now, however, that work is very largely done through agents, whose employment it is to find purchasers for those who entrust them with the sale of real estate, or to find property for those who wish to purchase. The volume of business done by these agents is yearly increasing, and as their services are almost invariably paid for by a commission on the value of the property which changes hands, some knowledge of the law governing their commissions is desirable. We purpose, therefore, to review shortly, for the benefit of those concerned, some of the leading cases on this subject.

To entitle a real estate agent to commision for the sale of lands, or, what is perhaps more usual, and almost the same in effect, for finding a purchaser, he must be employed by the person sought to be charged. The vendor is not liable for the voluntary introduction to him, by the agent, of a purchaser: *Re Baby & G. W. R. R. Co.*, 13 Q. B. 291. But employment may be implied from the acts of the parties, if the principal adopts the acts of the agent as his own. Though there was no previous employment, such conduct will entitle the agent to his commission: *Pettigrew* v. *Doyle*, 17 U. C. C. P. 34; *Dominion Bank* v. *Knowlton*, 25 Chy. 128. Where, as sometimes happens, a sale results from the efforts of an agent, who brought the purchaser and vendor together, and was present to assist them in coming to terms; but the vendor supposed that the agent was employed by, and acting for, the purchaser, there would be no such adoption of the agent's acts as to render the vendor liable. From the *American Law Review* we find that this was decided in *Atwater* v. *Lockwood*, 39 Conn. 45. The American cases also lay down the following propositions: where a principal accepts a contract made for him by an agent, after the period for which the latter was employed had ended, the circumstances would naturally be such that the acceptance of the contract would be construed as a continuance of the agent's employment. When there is no express provision to the contrary in the agreement between them, either the principal or the agent may revoke the agency of the latter at any time; but if the agent had incurred expense, or performed labour, in seeking to sell the estate, and the agency was revoked sooner than he might reasonably be expected to effect a sale, he would have a right to be reimbursed for his outlay. In case, however, he performs services which entitle him

to commission, the revocation of his agency after the services are performed, and before the completion of the sale on which the commision is conditioned, will not deprive him of his right to that commission Wholly unsuccessful services do not entitle the agent to any remuneration.

The agent must comply with the terms of the contract in order to have a claim for commission; but if the principal alters the terms of sale in such a way as to make a literal compliance, on the part of the agent, impossible, his right to commission is not thereby defeated: *Green* v. *Hayes*, 33 L. T. N. S. 91. When, for example, the sale is to be for a fixed price, but to prevent the agent from claiming commission, a reduction is made from that price, the agent can recover if he is able to show that the buyer was ready and willing to buy at that price. An agent employed to effect a sale, who has found a purchaser able and willing to buy on the stipulated terms, has earned his commission.

Justice Cox, in the recent American case of *Ryen* v. *McGee*, 1 Am. Law Mag. 351, says: "We think that a general authority to an agent to sell real estate, is simply an authority to find a purchaser, and it is not an authority to conclude and execute a contract of sale which shall bind the principal." If, however, the agent is empowered not merely to sell, but also to sell and convey, his power extends much further, and he has authority to receive the purchase money: *Farquharson* v. *Williamson*, 1 Chy. 93. And if he is empowered to receive money as the agent of another, he must, in the ordinary course of business, be his agent to give a receipt for it: *Bedson* v. *Smith*, 10 Chy. 292. If the principal consents to an exchange instead of a cash sale, as agreed upon with the agent, he will be liable for commission on the exchange: see *Kock* v. *Emmerling*, 22 How. 69; *Morgan* v. *Mason*, 4 E. D. S. 636.

What constitutes the agent the procuring cause of the sale? "In very many cases the services performed are of the very slightest possible kind; they consist merely of bringing the vendor and purchaser together—often by a line written, or a word spoken": *Mansell* v. *Clements*, L. R. 9. C. P. 139. See, also, *Earp* v. *Cummins*, 54 Pa. St. 394. In *Lincoln* v. *McClatchie*, 36 Conn. 136, the defendant placed a house in the plaintiff's hands for sale. The defendant was to have the right to sell it himself, in which case the plaintiff was not to have any commission. G. was looking for a house for his friend B., and learned from the plaintiff that the defendant's house was for sale, not casually, but by going to find what information the plaintiff could give him. B., knowing how the information had been procured, acted on it, and without communicating with the agent, became the purchaser. It was held that the agent could recover his commission for effecting the sale, as he was the procuring cause of it.

The connection of the agent with the sale must not, however, be merely remote and indirect. The plaintiffs were employed by the defendant to sell an estate for him upon commission on the amount of such sale. The estate was divided into lots, some of which were purchased by A. The authority of the plaintiffs to sell was revoked, and their commission paid. A subsequently purchased the remainder from the defendant by private contract. It was decided that the plaintiff could not recover commission on the latter sale: *Lumley* v. *Nicholson*, 34 W. R. 716.

In the American courts, where an agent advertised land at his own expense, under an agreement to find a purchaser, and a person who had seen the advertisement directed the buyer to the owner, the latter was liable for the commission.

In *Mansell* v. *Clements*, L. R. 9 C. P. 139, the plaintiffs were instructed by the defendants to offer a leasehold house for sale, for which they were to receive a commission if they found a purchaser, but only a guinea for their trouble, if the premises were sold without their intervention. The particulars were entered in the plaintiffs' books, and they gave a few cards to view. One W., who had observed on passing that the house was for sale, but without having examined it, called at the plaintiffs' office and obtained a card to view the premises in question, amongst others, the terms being written by the plaintiffs' clerk on the back of the card. W. went to the house, thought the price (£2,000) too high, and went away; but subsequently he, without the further intervention of the plaintiffs, renewed his negotiations with a friend of the defendants, and became the purchaser for £1,700. It was held that there was evidence for the jury that W. had become the purchaser of the premises through the plaintiffs' intervention, and the latter were entitled to commission. *Semble*, that it was proper to ask the purchaser whether he would have made the purchase if he had not got the card from the plaintiff. His answer to the question was in the negative.

The rule of equity which prevents an agent from acquiring any benefit for himself, other than his commission, from any transaction in which the agency is concerned, is strictly enforced in all dealings in regard to the sale of real estate for commission. The position of the agent being one of trust, he cannot lawfully place himself in a situation where he may be tempted to act against the interests of the principal, either for his own advantage, or that of some third person. An agent had been employed to sell or exchange certain lands; this, however, he had been unable to do, and the property was shortly afterwards offered for sale by auction under a power of sale in a mortgage. The agent bid, and became the purchaser. In an action impeaching the purchase, the court (SPRAGGE, C.) declared the agent a trustee for the principal: *Thompson* v. *Holman*, 28 Chy. 35. The grantee of the Crown executed a power of attorney in favour of an agent, authorizing him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until her death. During her residence there she urged the agent to dispose of the property, and in the course of the correspondence stated that she would be willing to accept £1,000 for it. The agent, in 1844, having directed the property to be sold by auction, his sister became the purchaser for £628, having authorized the person who attended to bid at the sale on her behalf, to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, the court set aside the sale by auction as having been made at a price not warranted by the agent's authority: *Kerr* v. *Lefferty*, 7 Chy. 412.

The case of an agent acting for both parties, either on an exchange or otherwise, is not unknown, and leads to unpleasant complications. If an agent employed on commission to purchase real estate receive or agree to receive from the

vendor any remuneration or commisssion contingent on the sale of the property, he acts in contravention of his duty to his principal and forfeits his right to commission from the latter: *Kersteman* v. *King*, see *ante*, vol. 15, p. 140.

Even in the event of an exchange of lands, the agent is not entitled, under some colourable pretext, to receive remuneration from the person with whom he bargains on behalf of his principal. *Culverwell* v. *Compton et al.*, 39 C. P. 342, is a case in point. The plaintiff, a real estate agent, was employed by the defendants to sell certain land at a stipulated price. In the course of his employment, and after negotiating with an intending purchaser, an exchange was made, certain other lands being taken by the defendant as part payment. The plaintiff demanded commission from the purchaser for bringing about the exchange. This demand was acceded to by the latter, though without acknowledging the right of the plaintiff to make it, and a sum of money was paid over to the plaintiff, who, however, contended afterwards that it was not paid as a commission but as a gratuity. The decision affirmed that such a sum, whether received as commission, strictly so-called, or as a gratuity, was a profit directly made in the course of, and in connection with, the plaintiff's employment, and would, therefore, belong to the defendant as his employer. But as it appeared that the defendants knew that the plaintiff had received the money, and they made no objection to his retaining it, but with full knowledge thereof, carried on negotiations for a settlement of his claim for remuneration for his services, they could not afterwards, in an action by the plaintiffs to recover for the services to them in disposing of the land, offset his claim by the amount which he had received from the other party.

All the conditions covenanted to be performed by the agent must be fulfilled to enable him to succeed in an action for his commission. When a plaintiff claimed commission on sale of land by A to the defendant, one term of the plaintiff's contract was that A's title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that the title was not submitted to the defendant's solicitor. The plaintiff could not recover without proving that the defendant's solicitor had approved A's title, or else that such a title was submitted to him as it was unreasonable for him to disapprove: *Clark* v. *Wood*, 9 Q. B. D. 276. The following case, though not relating to dealings with lands, illustrates the same general principle: A having a ship to sell, told W that if he was the means of introducing a purchaser, a commission would be paid to him. W having an offer through B, A agreed that if successful, W and B should share the commission. The first offer fell through, also a second from C through B. C, after some time, wrote direct to A, introducing another person, who eventually bought. It was held that C, as agent of the purchaser, having acted on information received from B, W was entitled to his commission, the chain of connection being sufficiently established: *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE *Law Reports* for May comprise 20 Q. B. D. pp. 597–721 ; 13 P. D. pp. 73–88; 37 Chy. D. pp. 539–721 and 13 App. Cas. pp. 1–240.

SALE OF GOODS—STOPPAGE IN TRANSITU—DELIVERY ON BOARD SHIP.

Very few of the cases in the Queen's Bench Division seem to require notice here. In *Bethell* v. *Clark*, 20 Q. B. D. 615, the Court of Appeal (Lord Esher, M.R. and Fry and Lopes, L.JJ.), affirmed the decision of the Divisional Court, 19 Q. B. D. 553, which we noted *ante* vol. 23, p. 408. In this case, goods were purchased by London merchants of a firm in Wolverhampton, and the purchasers requested the vendors to consign the goods "to the *Darling Downs*, to Melbourne, loading in the East India Docks." The goods were delivered to the carriers to be forwarded to the ship. Subsequently the vendors, having heard of the purchasers' insolvency, notified the carriers not to deliver the goods, and the carriers notified the lightermen, but too late to prevent the shipment of the goods on the *Darling Downs*. The ship sailed with the goods on board for Melbourne, but before she arrived the vendors claimed the goods from the ship-owners as their property ; and it was held that the transit was not at an end till the goods reached Melbourne, and, therefore, that the vendors had the right to stop them in transitu, and that the notice to the ship-owners was in time. The result of the decision of the Court of Appeal seems to be summed up concisely in the following passage from the judgment of Lopes, L.J., viz.:—

"When a place is fixed by the directions given by the buyer to the seller as the ultimate destination of the goods, and, *a fortiori* if there is an express stipulation as to their destination in the contract of sale, the transit is not at an end until the goods reach that place."

LIBEL—PUBLICATION—COMMUNICATION OF LIBEL BY HUSBAND TO WIFE—DEFACING WRITTEN CHARACTER OF A SERVANT—DAMAGES.

Wennak v. *Morgan*, 20 Q. B. D. 635, was an action against a husband and wife for libel and for malicious damage to a document. The injury complained of consisted in the defendant having written upon a written character, on the faith of which he had employed the plaintiff as a domestic servant, a statement to the effect that the plaintiff had been dismissed from the defendant's employment for staying out at night without leave. The character had been handed to the plaintiff, on his leaving the defendant's employment, by the defendant's wife. At the trial, Mathew, J., held that the defamatory matter had not been published by the husband handing it to his wife, and, therefore, as regards the alleged libel the action failed for want of proof of publication, and this view was sustained by the Divisional Court (Huddleston, B., and Manisty, J.). And as regards the injury to the testimonial of character, Mathew, J., held that the plaintiff could only recover nominal damages, and a verdict was entered for one shilling; but on this point the Divisional Court overruled him, holding that it should be left to the jury to say whether the character had been left with the defendant so as to pass the

property in it, or whether it had been left with him, merely on deposit to be returned to the plaintiff; and secondly, that the amount of damages was for the jury to assess, and that they would, if they found the injury had been maliciously done, be justified in giving substantial damages. A new trial on this point was therefore ordered.

None of the other cases in the Queen's Bench Division, and none of those in the Probate Division, appear to require notice here.

COMPANY—MISREPRESENTATION IN PROSPECTUS—LEGAL FRAUD—DECEIT—MEASURE OF DAMAGES.

Proceeding now to the cases in the Chancery Division, the important case of *Peek* v. *Derry*, 37 Chy. D. 541, demands attention. This was an action brought by a shareholder, against the directors of a tramway company, to recover damages for alleged fraudulent misrepresentations in a prospectus, whereby the plaintiff had been induced to take shares in the company The alleged misrepresentation consisted in its having been stated in the prospectus, that the company had been authorized, by special Act of Parliament, to use steam or other mechanical motive power, instead of horses. The Act referred to, however, merely authorized the use of steam or other mechanical power with the consent of the Board of Trade, which body, on subsequently being applied to, refused permission to use steam, except over a small portion of the road; and the result was the company was unable to carry on its proposed undertaking, and was wound up. Stirling, J., being of the opinion that though the representation in question was untrue, yet, if the true state of facts had been set forth, the plaintiff would probably have bought the shares all the same, dismissed the action. But the Court of Appeal reversed this decision holding that it was enough to entitle the plaintiff to recover, that the representation was a material and an untrue one, and that it had some, though not the sole, influence, in inducing him to buy the shares. The measure of damages was held to be, not the difference between the price paid for, and the market value of, the shares, at the time of the purchase, because the market value might thus have been inflated by reason of the misrepresentations in the prospectus, but the difference between the price paid and the real value of the shares at the time of the purchase, judged by the light of subsequent events, including the result of the winding up of the company. This is likely to become a leading case on the effect of misrepresentations in prospectuses, and generally in actions of deceit.

WILL—CONSTRUCTION—RESIDUARY GIFT TO CHARITIES—DIRECTION TO PAY OUT OF PURE PERSONALTY.

In re Arnold, Ravenscroft v. *Workman*, 37 Chy. D. 637, is a case upon the construction of a will, whereby the testatrix gave all her real and personal estate to trustees, upon trust, to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies to private individuals, and directed that all such should be primarily payable out of the proceeds of the sale of her "real and leasehold estate, if any." And she directed the trustees to

divide the residue into three parts, and pay the same to certain charities, and directed that "the foregoing charitable legacies" be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testator had no real or leasehold estate in England, but was possessed of land in the Cape of Good Hope, the value of which was less than the amount of the general legacies, and of pure and impure personalty. It was held by Kay, J., that the direction as to the payment of the charitable legacies was equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a direction to marshal the assets in favour of the charities; that the general legacies were primarily payable out of the land in the colony, and that the debts and funeral and testamentary expenses, and costs of action, and the unpaid portion of the general legacies, must be paid in the first place out of the impure personalty, so as to leave the pure personalty, as far as possible, to constitute the residue.

SUPPOSED LUNATIC—INTERIM RECEIVER.

In re Pountain, 37 Chy. D. 609, pending an application for an inquisition as to the lunacy of a supposed lunatic, the court appointed a receiver *ex parte* of the estate of the supposed lunatic, the case being urgent.

PRACTICE—ADDING PERSON AS PLAINTIFF—ORD. 16, R. 2—(ONT. RULE 103 *b*.)

In Besley v. Besley, 37 Chy. D. 64, a *cestui que trust* sought to add his trustee as a co-plaintiff with himself, the trustee refused to consent to be added, and it was held by North, J., that the case was no exception to Ord. 16, r. 2 (Ont. rule 103 *b*), which requires the consent of a party sought to be added as a plaintiff to be first obtained.

SIMPLE CONTRACT DEBT—STATUTE OF LIMITATIONS—ACKNOWLEDGMENT—PAYMENT OF INTEREST BY DEVISEE FOR LIFE.

A new point was raised *In re Hollingshead, Hollingshead* v. *Webster*, 37 Chy. D. 651, as to whether payment of interest on a simple contract debt by a devisee of realty for life, would keep the debt alive as against the remaindermen, the debt in question not being charged upon the realty. The question was further complicated by the fact that the devisee for life was also the executrix of the testator's estate. Mr. Justice Chitty held that the payments were made in her capacity of tenant for life, and that the effect of the payment was to keep alive the claim of the creditor as against the remainderman. The following is the rule laid down by Chitty, J., at p. 659: "The right principle to adopt is, that so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt affecting the real estate of which he is in possession; it is a sufficient evidence of a continuance of the testator's contract to pay the debt. For (if it be necessary to have recourse to the somewhat subtle doctrine of a promise to pay), it is a promise to pay out of

such real estate, which he, as the person in possession of such real estate, is competent to give on behalf of the real assets generally, and so as to bind those who take in remainder."

WILL—CONSTRUCTION—BEQUEST OF LEASEHOLD—CONTRACT BY TESTATOR TO PURCHASE REVERSION—LIABILITY OF LEGATEE OF LEASHOLD TO PAY PURCHASE MONEY.

In re Kershaw, Drake v. *Kershaw*, 37 Chy. D. 674, draws one's attention to the fact that *Locke King's Act* (R. S. O. c. 109, s. 37), as originally passed, did not apply to leaseholds, and by 40 & 41 Vict. c. 34, s. 1, this defect has been remedied in England, but no such amendment has as yet been made to the Ontario Act.

WILL—MORTGAGE DEBT—LOCKE KING'S ACT (R. S. O. c. 109, s. 37—CONTRARY INTENTION.

In re Fleck, Colston v. *Roberts*, 37 Chy. D. 677, is another case upon the construction of *Locke King's Act* (R. S. O. c. 109, s. 37). In this case, a testator directed his private debts to be paid out of the proceeds of certain life policies; he devised his real estate in trust and bequeathed his residue to his son, subject to the payment of his trade debts; after the date of his will, he deposited the title deeds of his real estate with his bankers, to secure an overdrawn bank account, and the question was whether the devisee of the real estate was bound to satisfy this charge thereon, and North, J., was of opinion that he was not. His reasoning may be gathered from the following passage: "What the testator has done is to provide very carefully for the payment of different debts out of different parts of his estate. He says that his private debts are to be paid out of the proceeds of certain policies; and further on in his will he disposes of his residue 'after and subject to the bequests and provisions in regard thereto hereinbefore contained, and to the payment of my trade debts (which I hereby declare shall be a charge on my personal estate).' I take that to be a clear direction that the trade debts are to be paid out of a particular fund; and that it is only the surplus beyond that sum which is to go for the benefit of the son."

PARENT AND CHILD—ADVANCEMENT—CONTRACT FOR PURCHASE BY SON—PAYMENT BY PARENT OF PART OF PURCHASE MONEY—PROMISSORY NOTES OF PARENT FOR PART OF PURCHASE MONEY.

In re Whitehouse, Whitehouse v. *Edwards*, 37 Chy. D. 683, a son of a testator entered into a contract for the purchase of a business, part of the purchase money was paid down by the testator, who was no party to the contract, and for the residue, the joint promissory notes of the son and the testator were given to the vendor. The testator's will provided that all sums of money advanced to his sons in his lifetime should be brought into account before they should participate under his will. After the testator's death, his executors under pressure from the vendor paid the promissory notes. It was held by Stirling, J., that the purchase of the business created no resulting trust in favour of the testator, but that the payment on account of the purchase money therefor made by the testator, was an advancement to the son, but that the subsequent payments of the notes by

his executors were not in the nature of "advancements" on account of the son's share, but that as to these latter payments the executors were entitled either to claim repayment from the son on the ground that the testator was merely liable on the notes as surety for the sons, or were entitled to stand in the place of the vendor, whose debt they had paid, and that the executors were entitled to elect which of these two positions they would take. If they elected to stand upon the original contract of principal and surety, they would be entitled to retain the amounts paid on the notes out of the income of the share coming to the son; but if they elected to stand in the place of the vendor, they would have to proceed against the son's estate, which he had assigned for the benefit of creditors, and would be bound by the proof of the claim made by the vendor and the release which the vendor, along with his other creditors, had given the son. The share bequeathed by the testator to the son was to be held in trust to pay only the income to him for life, without power of anticipation, and after his death to hold the capital and income of his share in trust for his children, and the question arose whether the sum "advanced" by the testator could be deducted from the corpus or only from the income; and the learned judge held that the word "share" meant not the income of the fund given to the son, but the corpus of the share itself, and that the "advancement" must be deducted from the corpus.

JOINT STOCK COMPANY—WINDING UP—CONTRIBUTORY.

In re Hall, 37 Chy. D. 712, was an application to place the holders of certain shares in a joint stock company on the list of contributories, under the following circumstances: In October, 1881, the company was formed, as stated in the articles of association, for the purpose of buying the business of A. W. H. & Co., for *inter alia* a sum to be paid in fully paid up shares. One Neilson, who was A. W. H.'s solicitor, prepared the articles of association, and to some extent acted as solicitor for the company. The shares were duly allotted, and certificates for them were issued to A. W. H., stating that the full amount had been paid up thereon; but the contract, under which the shares were issued, was not registered as required by the Companies Act. A. W. H., being indebted to a lady, subsequently, to secure the indebtedness, transferred some of these shares to the trustees of her marriage settlement, one of these trustees being Neilson, who prepared the transfer, but according to the evidence Neilson did not know that the particular shares transferred were vendor's shares, and the other trustees relied on statements made by him, that the shares were fully paid up, the company was afterwards ordered to be wound up, and the present application was against the trustees of the settlement; and Stirling, J., held, following *Berkinshaw* v. *Nicolls*, 3 App. Cas. 1004, that as the certificates of the shares contained a statement by the company, that such shares were fully paid up, the onus of proving that the trustees had notice that they were not fully paid up lay on the liquidator, and that Neilson had not been guilty of gross and culpable negligence in omitting to enquire whether the shares in question were vendor's shares, or whether the contract had been duly registered, and consequently that the trustees were not liable for calls.

WILL—CONSTRUCTION—BEQUEST TO "CHILDREN"—ILLEGITIMATE CHILDREN—"REPRESENTATIVES."

In re Horner, Eagleton v. *Horner*, 37 Chy. D. 695, is an illustration of the exception to the general rule that, under a bequest to children, illegitimate children are not entitled to take. In this case the testator bequeathed a fund "to my sister Charlotte, the wife of Thomas H.," during her life, and after her death to divide the share among all her "children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime, having attained twenty-one. Charlotte never was the wife of Thomas H., but for twenty-three years prior to the will she had, to the testator's knowledge, cohabited with him, and had had issue four children by him, two of whom were living at the date of the will, and at that date she was presumably past child-bearing. Thomas H., during all that time, and up to his death, had a lawful wife who survived him. The testator recognized the illegitimate children of his sister Charlotte as his nephews and nieces. Stirling, J. held that the testator in describing his sister Charlotte as the "wife" of Thomas H., when he knew she was not so, and in using correlatively with that expression the term "children" to describe the offspring of a woman whom he knew not to be lawfully married, had shown that he did not use the word "children" in its strict legal sense, and that the illegitimate children were entitled to the gift. He also held that the word "representatives" in the gift must be construed to mean either "the next of kin," or "descendants" of the deceased children, and not their "executors or administrators."

DEED OF ONE PARTNER, WHEN IT BINDS THE FIRM.

I. General Rule Requiring Special Authority.
II. Parol or Verbal Authority, when Sufficient.
III. Previous Assent or Subsequent Ratification.
IV. Instrument Equally Operative Without a Seal.
V. Partners who Executed Bound, though Others not.
VI. The Scope and Extent of the General Rule.
VII. Cases Exhibiting its Limits and Exceptions.

I. *General Rule Requiring Special Authority.*—It is a well settled, though technical, rule of the common law, that one partner cannot bind his copartner by the execution of a deed,* unless his authority to do so is itself under seal.† In one case,‡ it was thought that if the terms of the partnership agreement

* Anthony *v.* Butler, 13 Pet. (U. S.) 423.

† Donaldson *v.* Kendall, 2 Ga. Dec. 227; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375; Snyder *v.* May, 19 Pa. St. 235; Napier *v.* Catron, 2 Humph. (Tenn.) 534; Lambden *v.* Sharp, 9 *Id.* 224; Morris *v.* Jones, 4 Harr. (Del.) 428.

‡ Blackburn *v.* McCallister, Peck (Tenn.) 371.

authorized it, one partner could bind the firm by a sealed instrument executed in its name.* But Lord Kenyon, in a case where it was contended that the partnership having been instituted by writing under seal, that fact gave authority to each partner to bind the others by deed, said: "But I deny that consequence; . . . for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."† The conveyance, as well as the descent of realty is regulated by statute, and is not affected by any general law of partnership, wherefore the acting partner of a mercantile partnership cannot transfer the real property of the firm in the same manner as its personal property.‡ For the same reason, one partner cannot execute a bond under seal, in the partnership name, so as to bind the other partner;§ and the plea of *non est factum* will be sustained in an action against the firm on a bond so executed, even though it was executed under an authority from the copartner, not under seal, to execute a note in his name.‖ In short, at common law, one partner cannot do any act under seal to affect the interests of his copartner, unless it is to release a debt.¶

II. *Parol or Verbal Authority, when Sufficient.*—In a well-considered case, decided in the Superior Court of the City of New York,** Jones, C.J., after reviewing the English and American cases on this subject, says: "The principle that a partner cannot, by virtue of the authority he derives from the relation of copartnership, bind his copartner by deed, has been too long settled to be now shaken. It is the technical rule of the common law applicable to deeds which has been engrafted into the commercial law system of the law of partnership. . . . The reasons for the restrictions are not very satisfactory, for all the mischiefs which the expositors of the rule ascribe to the authority of members of a copartnership to seal for their copartners, may flow almost as extensively, and nearly with equal facility, from the use of the name and signature of the copartnership. The dangers of allowing the use of a seal to the members of a copartnership are supposed to consist in these two attributes of the seal: that it imports a consideration, and that it is competent to convey absolutely, or to

* In Napier *v.* Catron, however, cited in the preceding note, where in the agreement of partnership, under seal, each partner was authorized to bind his copartners by deed, and such agreement expired by its own limitation, and was continued by a written agreement, not under seal, it was held that the continuance did not carry with it the power, and that a mortgage of real estate, executed by one of the firm to secure the partnership, did not bind the other members.

† Harrison *v.* Jackson, 7 T. R. 207, 210.

‡ Platt *v.* Oliver, 3 McLean (U. S.), 27; affirmed on other grounds, 3 How. 333.

§ Gerard *v.* Basse, 1 Dall. (U. S.) 119; Hart *v.* Withers, 2 Penn. (N. J.) 285; Button *v.* Hampson, Wright (Ohio), 93; McDonald *v.* Eggleston, 26 Vt. 154; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68.

‖ Henry County *v.* Gates, 26 Mo. 315.

¶ McBride *v.* Hagan, 1 Wend. (N. Y.) 326.

** Gram *v.* Seton, 1 Hall (N. Y.), 262.

charge and encumber real estate. But negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and, upon general principles, the use of the seal of the copartner, equally with the signature of the copartnership, would, if permitted, be restricted to copartnership purposes and copartnership operations solely, and the joint deed of the copartners, executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the copartners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his copartner and to charge and encumber his estate as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority? Those powers undeniably place the fortune of the members of a general copartnership, to a great degree, at the disposal of any one of the copartners; but it is necessary to the beneficial management of the joint concern that extensive powers should be vested in the members who compose it; and when the copartners live remotely from each other, their joint business concerns cannot be advantageously conducted or carried on without a latitude of authority in each which is inconsistent with the perfect safety of the other copartners. It cripples the operation of a partner, whose distant residence precludes a personal co-operation, to deny him the use of the seal of his copartner for instruments requiring it, and which the exigencies of their joint concerns render expedient or beneficial to them. He must be clothed with the power to execute deeds for his copartners when necessarily required for the purposes of the trade; and if that authority is not inherent in the copartnership, it must be conferred by letter of attorney, and it must be general, or it will be inadequate to the ends of its creation. A copartnership especially which is employed in foreign trade, and has occasion to employ ships for the transportation of merchandise, or to borrow money on respondentia, if its members are dispersed, as is often the case, must be seriously embarrassed in its operations by the application of the rule that requires every copartner who is to be bound by the charter party or the respondentia bond, to seal it personally, or by attorney duly constituted for that specific purpose, with its own seal. Similar difficulties would arise out of the same rule when the operations of the house required the copartnership to execute other deeds. Can it then be that this stern rule of the common law, which has its appropriate sphere of action, and a most salutary operation on those relations of society where men not otherwise connected are the owners of undivided property, is to be applied in all its force, and to govern with unbending severity in the concerns of copartners whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other, to give to their operations efficiency, vigour and success? The pressure of these considerations has induced a relaxation of the common-law rule to adapt it to the exigencies of commercial copartnerships, and other associations of individuals operating with joint funds for the common benefit. The rule itself remains, but the restrictions it imposes are qualified by the application of other

principles. The general authority of a partner, for example, derived from his relation to his copartners, does not empower him to seal an instrument for them, so as to make it binding upon them without their assent and against their will. This is the fair import of the modern cases, and is, I apprehend, the principle courts are disposed to apply to the use of a seal in joint contracts for copartnership purposes. An absent partner is not bound by a deed executed for him by his copartners, without his previous authority or permission, or his subsequent assent and adoption. But the previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol. These are the results which I deduce from the judicial decisions, especially those of our own courts on the subject; and, if I am correct in my deduction, the conclusion must be favourable to the validity of this charter party as the deed of both the partners."* Thus it has been held that an attachment bond signed and sealed by one partner in the firm name, and authorized or ratified by parol, is valid.† In Alabama, however, a deed by one partner in the firm-name, conveys only his interest, though subsequently the other partners orally assent.‡

III. *Previous Assent or Subsequent Ratification.*—The result of an examination of the cases undoubtedly is, that the great weight of authority, in this country, is to the effect that, while one partner cannot bind his associates by deed by virtue of the contract of partnership, yet where he executes a sealed instrument in the name of the firm, under a prior verbal authority, or subsequent verbal ratification, it is binding on the firm,§ and that the assent of the other partner, or partners, may be implied from circumstances. ‖

But the previous authorization or assent, or the subsequent ratification, must be proved by him who seeks to enforce the instrument against the other partner,¶

* See, also, to the effect that the authorization may be by parol, Grady *v.* Robinson, 28 Ala. 289; Herbert *v.* Hanrick, 16 Ala. 581; Drumwright *v.* Philpot, 16 Ga. 424; Haynes *v.* Seachrest, 13 Iowa, 455; Pike *v.* Bacon, 20 Me. 280; Cady *v.* Sheperd, 11 Pick. (Mass.) 400; Clement *v.* Brush, 3 Johns. (N. Y.) Cas. 180; Swan *v.* Stedman, 4 Metc. (Mass.) 548; Fox *v.* Norton, 9 Mich. 207; Gwinn *v.* Rooker, 24 Mo. 290; Smith *v.* Kerr, 3 N. Y. 144; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165; Johns. *v.* Rattin, 30 Pa. St. 84; Lowery *v.* Drew, 18 Tex. 786; Wilson *v.* Hunter, 14 Wis. 683.

† Jeffreys *v.* Coleman, 20 Fla. 536.

‡ Bumson *v.* Morgan, 76 Ala. 593.

§ Grady *v.* Robinson, 23 Ala. 289; Herbert *v.* Hanrick, 16 Ala. 581; Gibson *v.* Wardon, 14 Wall. (U. S.) 244; Drumwright *v.* Philpot, 16 Ga. 424; Haynes *v.* Seachrest, 13 Iowa, 455; Ely *v.* Hair, 16 B. Mon. (Ky.) 230; Pike *v.* Bacon, 20 Me. 280; Cady *v.* Sheperd, 11 Pick. (Mass.) 400; Clement *v.* Brush, 3 Johns. (N. Y.) Cas. 180; Swan *v.* Stedman, 4 Metc. (Mass.) 548; Fox *v.* Norton, 9 Mich. 207; Gwinn *v.* Booker, 24 Mo. 290; Smith *v.* Kerr, 3 N. Y. 144; Bond *v.* Atkins, 6 Watts & S. (Pa.) 165; Johns. *v.* Rattin, 30 Pa. St. 84; Lowery *v.* Drew, 18 Tex. 786; Wilson *v.* Hunter, 14 Wis. 683.

‖ Person *v.* Carter, 3 Murph. (N. C.) 321; Layton *v.* Hastings, 2 Harr. (Del.) 147; Doe *v.* Tupper, 4 Sm. & M. (Miss.) 261; Morse *v.* Bellows, 7 N. H. 549; Lucas *v.* Saunders, 1 McMull. (S. C.) 311; Lee *v.* Onstott, 1 Ark. 206; Montgomery *v.* Boon, 2 B. Mon. (Ky.) 244; M'Cart. *v.* Lewis, *Id.* 267; Cummings *v.* Carsily, 5 *Id.* 47; Bentrin *v.* Zierlien, 4 Mo. 417; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113.

¶ Shirley *v.* Fearne, 33 Miss. 653.

for otherwise the deed will only pass the individual interest of the partner who executes it.*

It would seem, however, that a declaration alleging that the partners "made their certain writing obligatory signed by their firm-name," "and sealed with their seal," etc., is good on demurrer; if it was the deed of but one, it must be shown by plea on the part of the partner who did not execute the bond.†

The instrument may also become binding on the other partners on the principles of estoppel and ratification,‡ and the bringing of an action upon it, by the firm, is an adoption of the instrument, and the defendant cannot object that it is not the deed of the partnership.§

Again, such a deed is binding on the partner who does not execute it, if he is present and sees the other partner execute it and does not object; his acquiescence, with full knowledge of the act done, amounts to consent.‖

IV. *Instrument Equally Operative Without a Seal.*—Where an instrument executed by one partner, in the firm-name, and sealed, would be equally operative without a seal, the rule does not apply, *e.g.*, in the case of a sealed bill of sale of partnership property.¶ Thus, an eminent English jurist, in a bankruptcy case, remarked: "As to the objection that the security, being effected by a deed executed by one partner, could not bind the firm, it might be true that the instrument would not take effect as the deed of the firm; but the transaction itself was one within the authority of the partner, and the circumstance of a deed being executed would not invalidate the contract."** Accordingly, one partner

* Walton *v.* Tosten, 49 Miss. 569. See, however, Kasson *v.* Brocker (47 Wis. 79), where, on an appeal from the disallowance of a claim of partners in their firm-name, the appeal bond was executed in the firm-name, and the court held that the presumption was, in the absence of all proof, that it was so executed as to bind both partners, and the mode of execution was approved. *Contra*, Butterfield *v.* Hemsley, 14 Gray (Mass.) 226.

† Massey *v.* Pike, 20 Ark. 92.

‡ Mann *v.* Etna Ins. Co., 40 Wis. 549; Baldwin *v.* Richardson, 33 Tex. 16.

§ Dodge *v.* M'Kay, 4 Ala. 346.

‖ Kasson *v.* Brocker, 1 N. W. Rep. (N. S.) 418; Anthony *v.* Butler, 13 Pet. (U. S.) 423; Baldwin *v.* Richardson, 33 Tex. 16; Bentrin *v.* Zierlien, 4 Mo. 417; Blackburn *v.* McCallister, Peck (Tenn.), 371; Button *v.* Hampson, Wright (Ohio), 93; Cummins *v.* Cassidy, 5 B. Mon. (Ky.) 74; Day *v.* Lafferty, 4 Ark. 450; Doe *v.* Tupper, 12 Miss. 261; Donaldson *v.* Kendell, 2 Ga. Dec. 227; Fitchburn *v.* Boyer, 5 Watts (Pa.), 159; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Gerard *v.* Basse, 1 Dall. (U. S.) 119; Hart *v.* Withers, 2 N. J. L. 285; Henderson *v.* Barbee, 6 Blackf. (Ind.) 26; Hodson *v.* Porter, 2 Colo. 224; James *v.* Bostwick, Wright (Ohio), 142; Lambden *v.* Sharp, 9 Humph. (Tenn.) 224; Layton *v.* Hastings, 2 Harr. (Del.) 147; Lee *v.* Onstott, 1 Ark. 206; Little *v.* Hazard, 5 Harr. (Del.) 191; Lucas *v.* Saunders, 1 McMull. (S. C.) 311; Mackay *v.* Bloodgood, 9 Johns. (N. Y.) 285; M'Cart. *v.* Lewis, *Id.* 267; McDonald *v.* Eggleston, 26 Vt. 154; Modisett *v.* Lindley, 2 Blackf. (Ind.) 119; Montgomery *v.* Boone, 2 B. Mon. (Ky.) 244; Morris *v.* Jones, 4 Harr. (Del.) 428; Morse *v.* Bellowes, 7 N. H. 550; Napier *v.* Catron, 2 Humph. (Tenn.) 534; Person *v.* Carter, 3 Murph. (N. C.) 321; Pettes *v.* Bloomer, 21 How. (N. Y.) Pr. 317; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; Posey *v.* Bullitt, 1 *Id.* 99; Price *v.* Alexander, 2 Gr. (Iowa), 427; Snyder *v.* May, 19 Pa. St. 235; Trimble *v.* Coons, 2 A. K. Marsh. (Ky.) 375; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113; United States *v.* Astley, 3 Wash. (U. S.) 508.

¶ Patten *v.* Kavanagh, 11 Daly (N. Y.), 348; S. P., Keller *v.* West. 39 Hun (N. Y.), 348; Everit *v.* Strong, 5 Hill (N. Y.), 163.

** *Ex parte* Bosanquet, DeGex, 432.

may transfer personal property of the firm in payment of a *bona fide* firm debt, even though he do so by deed under seal.* In *Forkner* v. *Stuart*,† where one partner, in the absence of his copartner, executed a bill of sale, under seal, of all the partnership effects, the sale being *bona fide*, and for the full value of the property, and made to pay a pressing debt of the absent partner, it was held that the sale was binding upon the absent partner, and passed the whole title of the firm to the property. So, where a partner executes a bond in the name of the firm, and, upon being informed that it did not bind the partners, with the consent of the obligor, removes the seal, and re-delivers it, with the intent to bind the company, it is effectual as their promissory note.‡

Other well-considered cases, however, hold that a bond given in the partnership name, by one of the partners, for a simple contract debt due by the firm, does not extinguish the original debt as to the firm.§ So also, it has been decided that a sealed lease executed by one partner only, in the name of the partnership, though for a term which required no seal, does not pass the estate of the other partners, without evidence of previous authority or subsequent ratification by them.‖

The true rule is thus stated by Chief Justice Marshall in *Anderson* v. *Tompkins*:¶ "It is said this transfer of property is by a deed, and that one partner has no right to bind another by deed. For this a case is cited which, I believe, has never been questioned in England or in this country.** I am not, and never have been satisfied with the extent to which this doctrine has been carried. The particular point decided in it is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. That was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to the decision. No action can be sustained against the partner, who has not executed the instrument, on the deed of his copartner. No action can be sustained against the partner which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled. But I cannot admit its application in a case where the property may be transferred by delivery, under a parol contract, where the right of sale is absolute, and the change of property is consummated by delivery. I cannot admit that a sale so consummated, is annulled by the circumstance that it is attested by, or that the trusts under which it is made are described in a deed. No case goes thus far, and I think such a decision could not be sustained on principle."

V. *Partner who Executed Bound, though Others not.*—When one partner, without the consent of his copartner, gives the security of the firm, under seal,

* Hodges *v.* Harris, 6 Pick. (Mass.) 362.
† 6 Gratt. (Va.) 197.
‡ Horton *v.* Child, 4 Dev. (N. C.) L. 460.
§ Flemming *v.* Lawhorn, Dudley (S. C.), 360; Dickinson *v.* Legare, 1 Dessau. (S. C.) 537; Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165. But see Jacobs *v.* M'Bee, 2 McMull. (S. C.) 348.
‖ Dillon *v.* Brown, 11 Gray (Mass.), 179.
¶ Brock. (U. S.) 456, 462.
** Harrison *v.* Jackson, 7 T. R. 207.

for a partnership debt, and the creditor afterwards releases the copartner from all partnership debts, the simple debt being merged in the specialty, the copartner is released, but the specialty still binds the partner who signed the partnership name.* Thus, where two of three partners were present, and one wrote and the other sealed a note, given in the name of the firm, it is competent to go to the jury on the joint execution. It is not material to the liability of the two that they used the name of the firm without the third partner's assent.† Again, partners are tenants in common of land owned by the firm; and a deed by all the firm, but executed by one partner only, is effectual to convey that partner's undivided interest.‡ Such a conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside, on the ground that it was made without their consent and impairs the credit of the firm.§ But in *Fisher* v. *Perden*,‖ where, upon the face of the instrument, it appeared that one signed, sealed and delivered it, in order to bind the firm of which he was a member, and not as his own individual deed; it was held that he was not individually bound. The case, however, in the opinion of the present writer, is not in accord with the trend of the well-considered adjudications.

VI. *The Scope and Extent of the General Rule.*—This rule, of common law origin and still continuing vigour, prevents one partner from binding the other to execute a deed with covenants of a particular kind, as of warranty.¶ Even a surviving partner cannot, alone, convey realty belonging to the firm he represents.** Again, a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm, by only one of two partners named as principals therein, cannot be enforced against a surety without evidence of the assent of the other partner to its execution.†† And where one partner signs the partnership name to a forthcoming bond, in a case in which the partnership is defendant, the bond is void as to the partners not signing it.‡‡ So, also, one partner cannot bind his copartner by warrant of attorney, under seal, in the firm-name, without authority;§§ or by executing an appeal bond for both, under his general authority.‖‖

VII. *Cases of Exhibiting its Limits and Exceptions.*—The adjudications upon this subject are not, however, so harmonious as not to leave the question still, to some extent, an open one in some few jurisdictions. Thus it has been held that one partner may execute a power of attorney,¶¶ or a charter party under seal,***

* Clement *v.* Brush, 3 Johns. (N. Y.) Cas. 180; S. P., Williams *v.* Hodgson, 2 Harr. & J. (Md.) 474.

† Potter *v.* McCoy, 26 Pa. St. 458.

‡ Jackson *v.* Standford, 19 Ga. 14; Layton *v.* Hastings, 2 Harr. (Del.) 147; Jones *v.* Neale, 2 Patt. & H. (Va.) 339.

§ Treadwell *v.* Williams, 9 Bosw. (N. Y.) 649.

‖ 7 Jones (N. C.) L. 483.

¶ Ruffner *v.* McConnell, 17 Ill. 212.

** Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631.

†† Russell *v.* Annable, 109 Mass. 72.

‡‡ Doe *v.* Tupper, 4 Sm. & M. (Miss.) 261; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113.

§§ Ellis *v.* Ellis, 18 Vr. (N. J.) 69.

‖‖ People *v.* Judges of Dutchess, 5 Cow. (N. Y.) 34; Charman *v.* McLane, 1 Oreg. 339.

¶¶ *Re* Barrett, 2 Hughes (U. S.), 444.

*** Straffin *v.* Newell, T. U. P. Charlt. (Ga.) 163.

or a deed of composition, or release of a debt due the firm,* so as to bind his copartner, or the firm to which he belongs. So, it is said that a bond by two of three partners, to one of them as obligee, may be obligatory on the third partner;† that a bond given by one partner for the rent of real estate leased for the use of the partnership, is properly payable out of the partnership effects; and having been so paid, creditors of another partner cannot be substituted to the rights of the landlord on the bond;‡ that one partner, by an instrument under seal, may authorize a third person to discharge a debt due to the firm;§ and that under urgent circumstances, one partner, to prevent the sacrifice of the firm's real estate, may give a deed of trust thereof to secure a firm debt.‖

In *Durant* v. *Rogers*,¶ the property of a firm was levied upon under a judgment against a portion only of the partners, for a trespass committed by the active and managing partners, who, to save the property, procured plaintiff to unite with them in an appeal bond, whereby he was compelled to pay the judgment. The court held that each member of the firm became liable to him for the amount so paid to their use, whether they all united in the appeal or not, and that no proof of a promise to pay on the part of one of them not sued, and who did not join in the appeal, was necessary, as the law implied a promise, and that in such case the validity of the judgment appealed from was wholly immaterial.

In *Murrell* v. *Murrell*,** it is decided that one partner may convey property of the firm to his wife, in satisfaction of her claim for her paraphernal funds held by the firm.

And in *Gates* v. *Pollock*,†† where one of two partners, who had entered into a contract to do a job of work according to specifications, executed an instrument under seal, certifying that the contract was forfeited on their part, and that there had been a settlement and payment to him of a certain sum as a "present," it was held that such instrument amounted to a release, and took away the cause of action as to both partners. This last case, however, is within the rule, being simply the release of a debt due the firm.‡‡—*American Law Review.*

* Bruen *v.* Marquand, 17 Johns. (N. Y.) 58; Smith *v.* Stone, 4 Gill & J. (Md.) 310; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68; Morse *v.* Bellows, 7 N. H. 549; Beach *v.* Ollendorf, 1 Hilt. (N. Y.) 41; Crutwell *v.* DeRossett, 5 Jones (N. C.), L. 263.

† O'Bannon *v.* Simrall, 1 B. Mon. (Ky.) 287.

‡ Christian *v.* Ellis, 1 Gratt. (Va.) 396.

§ Wells *v.* Evans, 20 Wend. (N. Y.) 251 22 *Id.* 324.

‖ Breen *v.* Richardson, 6 Colo. 605.

¶ 87 Ill. 508.

** 33 La. Ann. 1233.

†† 5 Jones (N. C.), L. 344.

‡‡ See *supra*, note (9).

DIARY FOR JUNE.

3. Sun.....*1st Sunday after Trinity.*
4. Mon....Lord Eldon born, 1751.
5. Tues ...Maritime Court sits.
9. Sat.....H. C. J. sit. end. L. S. Easter Term ends.
10. Sun.....*2nd Sunday after Trinity.*
11. Mon....York C. C. sit. for motions begin.
12. Tues ...Gen. Sess. and C. C. sit. for trial except in York.
15. Fri. ....Magna Charta signed, 1215.
16. Sat.....York C. C. sit. for motions end.
17. Sun.....*3rd Sunday after Trinity.*
18. Mon....Battle of Waterloo, 1815.
20. Wed....Accession of Queen Victoria, 1837.
22. Fri. ....Longest day. Slavery declared contrary to law of England, 1772.
24. Sun.....*4th Sunday after Trinity.* St. John Baptist.
25. Mon....Sir M. C. Cameron died, 1887.
28. Thur. ..Coronation of Queen Victoria, 1838.
29. Fri. ....St. Peter.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

McKENNA *v.* McNAMEE.

Contract—Consideration—Failure of—Impossibility of performance.

McN. & Co. had been contractors for the construction of certain public works in British Columbia, which the Government of the Province had taken out of their hands. Believing that they could effect a restoration, they entered into an agreement with McK. & M. by which the latter were to complete the work and receive 90 per cent. of the profits, McN. & Co. to be still the recognized contractors with the Government, there being a clause in the contract against subletting. McK. & M. were fully aware of the state of affairs, and had examined all the provisions of the contract.

M. went to British Columbia and endeavoured to obtain the restoration of the contract, but failed to do so, and it not being restored, McK. & M. brought an action against McN. & Co. for breach of contract to take them into their service, and claiming for damages and moneys expended in the work, $125,000.

Held, affirming the judgment of the Court of Appeal for Ontario (14 Ont. App. Rep. 339), HENRY, J., dissenting, that as the agreement was made with a view to the restoration of the contract, and, as such restoration failed without fault on either side, the defendants were not liable.

McCarthy, Q.C., and *Mahon*, for the appellants.

O'Gara, Q.C., for the respondents.

CITY OF LONDON FIRE INSURANCE COMPANY *v.* SMITH.

Fire Insurance—Description of property—Mutuality of contract—Estoppel—Statutory condition—Variation.

The agent of an insurance company filled in an application, on behalf of S., for insurance on the building of the latter, which he described as being built of boards. The word, "boards," was very badly written, but the character of the building was sufficiently designated on a diagram on the back of the application, which the agent was instructed to fill in, marking a brick building in red and a frame building in black—in this case it being marked in black. There was no special rate of premium for a building built of boards, and the rate charged to S. was that specified in the tariff of the company for a brick building, he having authority to fix such rate.

The application was sent to the head office, and a policy issued thereon, describing the building as brick, the word written "boards" in the application being read by mistake as "brick." The mistake was not brought to the notice of the head office until the insured premises was destroyed by fire, and a claim was made for the amount of the loss under the policy, but after receiving notice of the error the company, under a clause in the policy, caused such claim to be submitted to arbitration, but refused to pay the amount awarded to S. on the ground that, owing to the mistake in the policy, there had been no mutuality of contract between them and S., and no valid contract ever existed between them.

Held, affirming the judgment of the Court of Appeal for Ontario (14 Ont. App. R. 328), that there was a valid contract existing between the company and the assured, but even if there were not, the company could not set up want of mutuality, after treating the contract as existing, by the submission to arbitration and in other ways.

By the 17th statutory condition of the Act relating to insurance companies, R. S. O. c. 62, a loss shall not be payable until thirty days after the completion of proofs, unless otherwise provided by statute or agreement of the parties.

Held, that this was a privilege accorded to the company which could not extend the time

limited by a variation of the condition under sec. 4 of the above Act, though such period might be shortened.

Per STRONG, J., that inserting a clause in a policy extending the time for payment of loss to sixty days, in the form prescribed by said sec. 4, is not a variation by agreement of the parties within the meaning of the statutory condition.

Robinson, Q.C., and *Millar* for the appellants.

McCarthy, Q.C., for the respondents.

MOLSON *et al. v.* LAMBE *es qual.*

Prohibition—Licensed brewers—Quebec License Act—41 *Vict. c.* 3—*Constitutionality of.*

R., a drayman in the employ of J. R. M. & Bros., duly licensed brewers under 43 Vict. c. 19 (Q.), was charged before the Court of Special Sessions of the Peace at Montreal with having sold beer outside of the business premises of J. R. M. & Bros., but within the revenue district of Montreal, in contravention to the Quebec License Act, 41 Vict. c. 3. On a writ of prohibition issued by the Superior Court, at the instance of appellants, claiming *inter alia* that, being licensed brewers under the Dominion Statute, they had the right of selling beer by and through their employees and draymen without a Provincial license, and that the Quebec License Law of 1873 and its amendments were unconstitutional, and if constitutional did not authorize the complaint and prosecution against R.

Held, reversing the first holding of the court below, that the Court of Special Sessions was the proper tribunal to take cognizance of the alleged offence of R., and therefore a writ of prohibition did not lie in the present case (TASCHEREAU and GWYNNE, JJ., dissenting).

2. Affirming the judgment of the court below, that the Quebec License Act of 1878, 41 Vict. c. 3 (Q.), is constitutional; GWYNNE, J., dissenting on the ground that the Quebec License Act, 1878, imposed no tax on brewers, and therefore the prohibition should be ordered to be issued absolutely.

Appeal allowed with costs.

Kerr, Q.C., for appellants.

Geoffrion, Q.C., for respondent.

QUEBEC STREET RAILWAY COMPANY *v.* CORPORATION OF THE CITY OF QUEBEC.

Street Railway—By-law—Construction of—Notice—Six months.

The Quebec Street Railway Company were authorized, under a by-law passed by the Corporation of the City of Quebec, and an agreement executed in pursuance thereof, to construct and operate in certain streets in the city a street railway for a period of forty years, but it was also provided that "at the expiration of twenty years (from the 9th of February, 1865) the corporation may, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment," etc., etc. On the 9th of January, 1884, the Corporation of the City of Quebec gave a notice to the company of their intention to take possession, but afterwards gave a second notice, on the 21st of November, 1884, whereby the corporation informed the company that the previous notice was annulled, and that after the 9th of February, 1885, at the expiration of the time and in the manner prescribed by the by-law, they would assume possession, and subsequently, on the 21st of May, they tendered $23,806.30 for the property.

In an action brought to declare the tender valid, and for a decree declaring the corporation entitled to take possession,

Held, reversing the judgment of the court below, FOURNIER, J., dissenting, that the company were entitled to a full six months' notice prior to the 9th of February, 1885, to be given within the twelve months preceding the 9th of February, 1885, and therefore the notice relied on was defective.

Appeal allowed with costs.

Irvine, Q.C., and *Stuart*, for appellants.

P. Pelletier, Q.C., for respondents.

KLOCK *v.* CHAMBERLAIN *et al.*

Sale by wife to secure debts due by her husband—Simulated deeds—Art. 1301 *C. C.* (*Q.*)

Where the sale of real estate by the wife, duly separated as to property from her husband, to her husband's creditor is shown to have been intended to operate as a security

only for the payment of her husband's debts, such sale will be set aside as a contravention of Art. 1301 C.C.(Q.) STRONG, J., dissented on the ground that the trial judge's finding that the deeds of sale in this case were not simulated, should be affirmed.

Appeal dismissed with costs.

Flemming, Q.C., for appellant.

Aylen, for Respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Armour, C. J.] [May 18.

CLARKSON *v.* ATORNEY-GENERAL OF CANADA.

Customs duties—Lien of Crown—Writ of extent—Preference of Crown over subject—R. S. O. (1887) c. 94.

On the 3rd Febuary, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 Vict. c. 26, and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the Customs Department, B. had sold before the assignment certain other coal, imported by him, without first paying the duty upon it.

Held, 1. That there was nothing in the Customs Act, R. S. C. c. 32, nor in law, giving the Crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him.

2. That the issue of a writ of extent by the Crown against B. on the 19th Febuary, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the Crown nothing, so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff.

3. That the claim of the Crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors; the principle that when the right of the Crown and the subject came into competition that of the Crown is to be preferred, has been applied in winding-up proceedings instituted under statutes which did not bind the Crown, and where the property was not divested out of the Crown debtor by the proceedings; but the principle is not applicable to claims upon estates in bankruptcy, or estates assigned in trust for creditors; in any case the principal has now no existence in Ontario, because the effect of R. S. O. (1887) c. 94, is to do away with any distinction between debts due from a subject to the Crown and debts due from subject to subject, and to place them all on the same footing.

Lash, Q.C., and *R. S. Cassels*, for the plaintiff.

Robinson, Q.C., and *Wickham*, for defendants.

Common Pleas Division.

REGINA *v.* LEE.

Canada Temperance Act, 1878—Police magistrate appointed for county exclusive of city—Right to sit in city to hear offence arising in county—Appointment "during pleasure"—Necessity for place set apart to hear offences—Alternative jurisdiction—Constitutional law—Appointment of police magistrates.

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate of the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the Canada Temperance Act, did unlawfully sell intoxicating liquors, etc., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his (G.'s) office, "Court House, Brantford," before him, or such justices of the peace for the said county as may then be there, to answer said charge. On application for a prohibition to prohibit G. from hearing the complaint,

Held, by ROBERTSON, J., that under 49 Vict. c. 4, s. 9 (O.) and sub-secs., G. had authority to adjudicate and determine the matter of the complaint at the city of Brantford.

Held, also, that G.'s commission was properly issued during pleasure; and that it was not necessary under ss. *b*, s. 103 of the Canada Temperance Act, that the town of Paris should be excluded from the operation of the commission; but *quære*, whether the police magistrate could try an offence arising within the said town.

Held, also, that there was nothing in the statute which requires the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor. However, a room in the Court House was set apart by the county council, when not required for other purposes; and also under 48 Vict. c. 17, s. 4 (O.), G. had the right to occupy the court room.

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition.

Held, also, that the appointment of police magistrates is not *ultra vires* of Legislature of Ontario.

Regina v. *Bennett*, 1 O. R. 441 followed.

On appeal to the Division Court, the judgment was affirmed.

McKenzie, Q.C., for plaintiff.

Delamere, for Crown.

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was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of lane, which sloped toward the sidewalk, the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there.

Held, that there was no evidence of negligence on the part of the defendants.

J. K. Kerr, Q.C., and *J. R. Roaf*, for plaintiff.

Robinson, Q.C., for defendant.

RYAN *v.* MCKERRAL.

Bills of exchange and promissory notes—Third person becoming party after maturity without any consideration—Liability—Endorsement of payment of interest on back of note—Extension of time of payment—Discharge of surety.

Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time of payment, such third person is not liable thereon.

Crofts v. *Beale*, 11 C. B. 172, followed; and *Currie* v. *Misa*, L. R. 10 Ex. 153, 1 App. Cas. 554, and *McLean* v. *Clydesdale Banking Co.*, 3 App. Cas. 95, distinguished.

An endorsement on the back of a note of the payment of interest up to a future date beyond the maturity of the note, in the absence of evidence of mistake, is to be deemed an extension of time for the payment of the note to such date, so as to discharge a party thereto who is merely a surety for the payment thereof.

Houston, for plaintiff.

Aylesworth, contra.

THE CORPORATION OF THE COUNTY OF VICTORIA *v.* THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Municipal corporations—Boundary line roads—Deviations—Adjoining counties—Liability.

The counties of Victoria and Peterborough adjoin each other, and up to 1863, when they were disunited, were united for municipal and other purposes. The boundary line road between these counties deviated in several places, owing to natural obstructions. At the place in question, where the deviation was wholly in the township of Verulam, in the county of Victoria, which deviation was recognized as a deviation from the boundary line, two bridges were built, during the union, at the joint expense, and were treated as subject to the joint control and liability. By 42 Vict. c. 47 (O.), which came into force on 5th March, 1880, a portion of the township of Harvey, in the county of Peterborough, adjoining Veru-

lam, including the part opposite to the place in question, was detached from Harvey and oined to Verulam for municipal and other purposes, as is enacted, as if it had always been part of Verulam. In 1879 a new bridge was built at the said place, and an arbitration had between the counties, and on May 18th, 1880, after the said Act came into force, an award was made settling defendants' share of the cost, which they paid. In 1887, the bridges having got into disrepair, the plaintiffs appointed their arbitrator to settle the cost of repair, etc.; but defendants refused to join in the arbitration, contending that since the 42 Vict. no liability therefor was cast on them. The inhabitants of certain portions of the adjoining townships in Peterborough continued to use these bridges, which were their only means of access to their county town and market.

Held, that the road at the said place must still be considered the boundary line road, and defendants were liable for the maintenance and repair of the bridges.

Moss, Q.C., and *Hudspeth*, Q.C., for plaintiffs.
Lash, Q.C., and *Edwards*, for defendants.

WILKINSON *v.* HARVEY *et al.*

Sheriff—Liability of execution creditors for wrongful seizure—Solicitor and client—Liability for acts of solicitor.

The defendants, who lived in Hamilton, and had a claim against W. at Ingersoll, issued a writ therefor through their solicitors C. & B., which was served by C., who went to Ingersoll under special instructions from defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ, who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff, who accordingly notified C. & B. C. & B. refused to accept this, and wrote to the sheriff in effect that he had acted improperly in not seizing the goods on *ex parte* statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure,

Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendant's solicitors, and as the solicitors were acting under special instructions from the defendants, the latter were liable to the plaintiff. *Smith* v. *Keal*, 9 Q. B. D. 340 distinguished.

G. T. Blackstock, and *Walsh*, for plaintiff.
P. Denovan, for defendants.

THE CORPORATION OF THE TOWNSHIP OF OXFORD *v.* GAIR *et al.*

Principal and surety—Municipal corporations—Bond—Release of surety—New bond.

A bond, intended to be a joint and several bond, was drawn up, to be executed by G., who was plaintiff's treasurer, and by L. and A., as his sureties. A. executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to run as a councillor, A. requested the council to release him from the bond, which was agreed to, and on 17th January, 1887, a formal resolution was passed accepting H. as surety in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A. on the first bond,

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate of the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the Canada Temperance Act, did unlawfully sell intoxicating liquors, etc., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his (G.'s) office, "Court House, Brantford," before him, or such justices of the peace for the said county as may then be there, to answer said charge. On application for a prohibition to prohibit G. from hearing the complaint,

tered into an agreement with C. for the sale of the land to him for a sum less than the amount due them, which was followed by a conveyance to him. Subsequently, the plaintiffs brought an action against defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L., when they took the conveyance from her, was that defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them.

Held, that whether there was such an agreement or not, it would not be binding on defendant, for he having sold to L., subject to the mortgage, it was L.'s duty to indemnify him against it, and plaintiffs took with knowledge of this, and never communicated with him; and, moreover, by their subsequent sale to C. they put it out of the defendant's power to redeem.

North of Scotland Mortgage Co. v. *Udell*, 46 U. C. R. 511, and *North of Scotland Mortgage Co.* v. *German*, 31 C. P. 349, commented on.

J. K. Kerr, Q.C., for plaintiff.

FORWARD *v.* THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Ice on sidewalk—Water running down lane in front of sidewalk and freezing—Evidence of negligence.

By reason of ice on the sidewalk on Yonge Street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of lane, which sloped toward the sidewalk, the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there.

Held, that there was no evidence of negligence on the part of the defendants.

J. K. Kerr, Q.C., and *J. R. Roaf*, for plaintiff.

Robinson, Q.C., for defendant.

BRUNELL *v.* THE CANADIAN PACIFIC RAILWAY CO.

Master and servant—Railways—Accident—Negligence—"Workmen's Compensation for Injuries Act"—49 Vict. c. 28, s. 3, ss. 5. (O.).

B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler of the engine, which resulted in his death. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to show to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendant's officials, it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under "The Workmen's Compensation for Injuries Act," 49 Vict. c. 28, s. 3, ss. 5 (O.).

Held, that the defendants were not liable.

J. K. Kerr, Q.C., and *Carson*, for plaintiff.

G. T. Blackstock, for defendants.

ARNOLD *v.* CUMMER.

Limitations, Statute of—Entry by owner—Life lease to one of several in possession—Effect of.

In 1860, D. M., the then owner of certain lands, conveyed to A., who in 1861 conveyed to N., through whom the plaintiff claimed. D. M. continued in possession, and, at his request, his sister, M. B., came and resided with him, and took charge of the house and their sister, S. M., who was subject to fits, which to some degree affected her mind. In 1862, D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868, defendant, the sisters' nephew, came to reside with them, M. B. giving him charge of the

place, upon which he subsequently erected buildings. In 1875, N. went upon the land in assertion of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favour of M. B. and S. M., which was accepted by S. M., who executed the lease, but not by M. B., who refused to do so; S. M., M. B., and defendant still continuing to reside on the premises. M. B. died in 1879 and S. M. in 1886. The defendant continued to reside thereon. In 1887, the plaintiff brought ejectment against defendant, who claimed a title by possession.

Held, that N., having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and his successors in title, and, therefore, plaintiff was entitled to recover.

Pelly, for plaintiff.

Atkinson, Q.C., for defendant.

BETTS *v.* SMITH *et al.*

Contract—Tender—Evidence of prior agreement—Guarantee—Reference to advertisement.

The defendants, acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage, for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for $1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B., by whom the tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender, by which he was to get 75 cents a day for every three meal ticket, and the committee were to charge $1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract.

At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection.

In an action to recover the amount of the plaintiff's loss from the defendants,

Held (MACMAHON, J., dissenting), that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable.

Per MACMAHON, J.—The advertisement and requirements must, under the circumstances, be incorporated into the tender and acceptance, and so form part thereof, so as to render the defendants liable.

McNeely v. *McWilliams*, 13 A. R. 324, and *Lindley* v. *Lacey*, 17 C. B. N. S. 578, commented on.

Lount, Q.C., for plaintiff.

Bigelow, for defendant.

MCGILL *v.* WALTON.

Malicious prosecution—Reasonable and probable cause—Evidence of—Non-statement of full facts to solicitor and police magistrate.

The plaintiff, at Brantford, having corresponded with the defendant, at Hamilton, as to purchasing ice, defendant, on 7th September, notified plaintiff by telegram that the ice would not be sent unless plaintiff telegraphed money to cover freight and ice, to which plaintiff answered that the money was paid to the express company, and to send a full car, which was done. No money had, however, been paid to the express company. On the 9th September, defendant telegraphed plaintiff, asking what he meant. The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to plaintiff on the following day. The plaintiff had, on 9th September, deposited $30 with a bank in Brantford to defendant's credit, supposing it would be transmitted to defendant.

which was not done. On 1st October, defendant wrote plaintiff that unless he sent the full amount of account, defendant would have to take criminal proceedings. On 7th October, the defendant not having received a reply from plaintiff, consulted his solicitor, who, defendant said, advised that plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, laid information before the police magistrate, who issued a warrant under which plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank was proved to be true, whereupon the magistrate stated that there was no ground for the arrest, and dismissed the case. In an action for malicious arrest, the jury found that the defendant believed the plaintiff had not deposited the money with the express company or with the bank, but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate.

Held (reversing the judgment of CAMERON, J., at the trial), under the circumstances, there was a want of reasonable and probable cause, and the plaintiff was entitled to recover.

McCarthy, Q.C., for plaintiff.

Teetzel, for defendant.

PRIESTMAN *v.* BRADSTREET.

Dismissal — Stock speculations.

The defendants carry on the business of a commercial agency of which the plaintiff was general manager. By the terms of his engagement plaintiff was to be paid a salary of $5,000, and was to devote his whole time, influence and talents to the successful promotion of the business, the failure of either party to keep the agreement rendered it void. In the discharge of plaintiff's duties in rating merchants when found speculating, their rating would be lowered. The plaintiff having engaged in speculating on margins in the stock and grain exchanges through brokers and bucket shops, sunk all his private means, and had become indebted to a large extent beyond his ability to pay, and thereby brought the company into disrepute. He was requested by defendants to give up these practices, which he refused to do, saying that if his doing so was a condition of his remaining with the company he would dissolve his connection therewith. Whereupon he was dismissed.

Held, that the company were justified in dismissing him.

C. H. Ritchie, for plaintiff.

Osler, Q.C., for defendant.

BLACK *v.* TORONTO UPHOLSTERING CO.

Meaning of contract— Actual first cost.

The defendants, carrying on business in manufacturing and upholstering goods, entered into an agreement with plaintiff, whereby plaintiff was to manufacture all the upholstered goods sold by defendants at an advance of eleven per cent. upon the actual first cost of goods made and shipped from Toronto, the percentage to pay cost of packing and shipping the goods, and material used as packing should be charged at cost price. The plaintiff to buy all goods required for manufacture (except such frames as plaintiff should make himself) from defendants, and the price charged for the goods should be understood as the actual first cost, and the actual first cost value of the goods so manufactured for defendants should be computed from the price charged by defendants to the said plaintiff.

Held, under the agreement, the "actual first cost" on which plaintiff was to charge an advance of eleven per cent. was the price of material used and the wages paid.

Lount, Q.C., and *Reeve*, for plaintiff.

Shepley, for defendant.

CASEY *v.* CANADIAN PACIFIC RAILWAY CO.

Liability for accident—Negligence.

The defendants' station at A is on what was known as the side track, between which and the main track there was a platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and ascertaining from her that she had left her rubbers in the car, he attempted to cross over the side track and reach the platform, when the engine and tender, which had been detatched from the rest of the train and were backing down the

side track to pick up a car some fifty yards distant, ran on the plaintiff and injured him. The plaintiff was looking in the opposite direction from that in which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross and so avoided the accident, as it was only a second or two from the time he left the platform until he was struck, and there was no obstruction to this view.

Held, that the accident having been caused by the plaintiff's own negligence and want of care, the defendants were not liable.

Quære, whether an engine and tender constitute a train within s. 52 of R. S. C. c. 109, so as to require a man to be stationed on the rear car to warn persons of their approach, but in any event there was a man so stationed here who did give warning.

Held, also, that the statutory obligation to ring the bell or sound the whistle only applies to a highway crossing and not to an engine shunting on defendants' own premises.

J. Reeve, for plaintiff.

G. S. Mackintosh, for defendant.

DUNCAN *v.* ROGERS.

Way—Easement appurtenant to land conveyed, etc.—Prescriptive right to—Recoverable because—Agreement, construction by court of.

Some years prior to 1847, J. D., plaintiff's father, became the owner of lot 18 in the 5th concession of York, and built the house in which he lived up to the time of his death, on the north-west half and near the 6th concession line. In 1847 J. D. purchased lot 19, adjoining lot 18 on the north, the occupiers of the eastern portion of which, prior thereto, and J. D.'s tenants since, used a trail or road running from the northerly part of the east half of 19, where plaintiff's house stands, across the west half of 19 to the boundary of 18 and 19, where there were several trails or roads across the west half of 18 to a permanent lane leading in a westerly direction past J. D.'s house to the 6th concession. The trails ran through bush land, and no one thereof was solely or exclusively used, but as was convenient. In 1860 J. D. conveyed the east half of 19 to plaintiff, and plaintiff also acquired by devise from his father, who died in 1877, the north-east quarter of 18, which adjoined the east half of 19 on the south. The west half of 19 J. D. devised to his daughter, who had ever since been in occupation thereof, and the north-west half of 18 to his son W., who was living with him at his death, and who conveyed the same to defendant. Shortly after J. D. conveyed the east half of 19 to plaintiff, he, with J. D.'s permission, cut a new roadway on the southerly side of the woods on lot 18, connecting thereby with the lane to the 6th concession. In 1877, by an agreement entered into between plaintiff and W. D., in consideration of certain privileges granted to W. D., W. D. covenanted to permit plaintiff to have a right of way along the said lane from the 6th concession and extending forty rods east of the centre of the lot, so as to allow plaintiff free communication from lot 19 along said lane to the 6th concession.

Held, that there was no defined right of way in 1860 over the west half of 18 appurtenant to the east half of 19, so as to enable plaintiff to claim an easement therein as granted under the words therefor in the conveyance of 1860; that the user of the roadway cut in 1860 being merely a license, was revocable at any time, and was revoked by the father's death, and thereafter the user, as the evidence showed, was merely permissive, which was acceded to by plaintiff in 1877 by his entering into the agreement of that date.

Per MACMAHON, J.—The jury are to find questions of fact, to which the court must apply the law on the facts so formed. The construction of the agreement was for the court, and its meaning was that the old lane was to be extended easterly in a straight line for forty rods.

Fullerton, for plaintiff.

Tilt, for defendant.

ANDREWS *v.* BANK OF TORONTO.

Deed of composition and discharge—Covenant not to sue.

On 1st September, 1883, B. & Co. drew on plaintiff at four months for $783.50, the amount of his indebtedness, which plaintiffs accepted,

and B. & Co. discounted with defendants. The draft, not being paid at maturity, was protested by the bank. On 7th January, 1884, B. & Co. made an assignment for the benefit of their creditors; and, on 25th January, plaintiff, also becoming embarrassed, procured his creditors, including B. & Co.'s estate, to execute a deed of composition and discharge, whereby the creditors agreed to accept 50 cents on the dollar on their respective debts, payable 30 days from the date of the deed, one D. being surety for the said payment within the time limited.

There was a covenant by plaintiff and his surety to pay the several creditors, on or before the 25th February, the said 50 cents; and by the creditors with plaintiff not to sue for their several debts; that if plaintiff and his surety should observe and perform the covenants and agreements on their part, the creditors would release and deliver up the bills, notes, etc., held by them; and that if any of the creditors should sue for their debts, the deed might be pleaded in bar. The bank refused to execute the deed of composition. They proved against B. & Co.'s estate, and received a dividend of 40 cents, which they applied on the paper discounted by B. & Co., and upon which a customer was accommodation guarantor. The bank afterwards sued or threatened to sue plaintiff for the amount of the draft, and, he not knowing that the bank had received the dividend, paid them in full; but, on discovering the fact, brought this action to recover the amount received by them. The plaintiff had not paid B. & Co. the 50 cents, or any part thereof.

Held, that the covenant not to sue on the deed of composition and discharge was not absolute, but merely conditional on payment being made within thirty days; and as plaintiff had not paid B. & Co. within the thirty days, he could not have claimed a release and set up the covenant as a bar to the action; that the bank were trustees for B. & Co. to the extent of 40 cents on the dollar of the amount received from the plaintiff; and B. & Co. could compel the bank to refund such amount to them; and therefore plaintiff had no right of action against the bank.

Lash, Q.C., for plaintiff.

Robinson, Q.C., and *T. P. Galt*, for defendants.

Chancery Division.

Boyd, C.] [April 9.

THE CORPORATION OF THE VILLAGE OF WESTON *v.* CONRON *et al.*

Principal and surety—Surety for treasurer—Treasurer being allowed to receive taxes instead of a collector being appointed—Liability of.

The defendant, C., was appointed treasurer of the plaintiffs in 1882, and continued in office until 1887.

He was also the clerk of municipality, and as such, in 1885, received certain taxes from the ratepayers for two months of that year. In an action against C. and N., who were sureties for C., in which year it was sought to charge both defendants with all moneys come to C.'s hands, and not accounted for, it was

Held, on appeal from a referee's report, that that temporary function was not of such a nature as to terminate C.'s duties as treasurer by implication, and that when the money came to his hands with which he charged himself, as treasurer, the responsibility of the surety began, and that he should not be charged with any sums which did not appear in his books, as treasurer, and which were referable to taxes otherwise received by him.

Foy, Q.C., and *J. Nason*, for the appeal.

J. K. Kerr, Q.C., contra.

Boyd, C.] [April 26.

BANKS *et al. v.* ROBINSON *et al.*

Agreement to sell—Property not to pass—Stipulation for taking possession—After acquired property—Registration—R. S. O. c. 125.

J. R., by an instrument in writing, agreed in 1880 to sell his business and stock-in-trade to his sons, and provided that all the existing stock was to remain his property until it was paid for, and all after-acquired property brought in by way of substitution for existing stock was to become his property for the purposes of the security for the purchase money, and that on default he should have the right to re-enter and take possession. Default having been made, he took possession in January, 1888, and began selling off by auction. The

sons made an assignment for the benefit of creditors in March, 1888. In action brought by the assignor and some creditors of the sons to restrain J. R. from selling, it was

Held, that the legal operation of the instrument of 1880 was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made and possession taken, that Act clothed him with the legal title in the after-acquired goods, which was not affected by the assignment for creditors subsequently executed.

Held, also that the instrument did not need to be registered to make it operative against subsequent creditors. The Bills of Sale and Chattel Mortgages Act, R. S. O. c. 125, was not intended to cover the case of agreements creating equitable interests in non-existing and future acquired property. The effect of the transaction in this case, and the advisability of making provision for giving publicity by registration to such dealings commented on.

Barker v. *Leeson*, I. O. R. 114, not followed.

Reeve, Q.C., and *Neville*, for plaintiffs.

Maclennan, Q.C., for defendant, Joseph Robinson.

Boyd, C.] [April 27.

THE OAKWOOD HIGH SCHOOL CASE.

High School—Application to municipality for grant—R. S. O., 1887, *c.* 226, *s.* 35.

Prior to August 1st, 1887, the Oakwood High School Board made application to the council of the municipality for a grant of $4,000 for school purposes, and asked further the privilege of building the new building contemplated on township property. This application was negatived by the municipal council by four to one on July 18th, whereupon the school trustees present at the meeting said they would forego their claim to the benefit sought over and above the $4,000, and would at the next meeting bring forward a by-law for the $4,000 alone. They did so at the next council meeting, on August 8th, when a by-law authorizing the grant was voted, with the result of three votes against it and two votes for it.

Held, that under R. S. O., 1887, c. 226, s. 35, this was not a refusal of the application, but by the interpretation put on that section, was an affirmance and an acceptance of the requisition of the High School Board, and the council could not afterwards pass a by-law repealing it, and refuse to give the money.

Before the passing of the original of the above enactment, a municipal council had not option to reject, but were under parliamentary obligation to raise by assessment the amount required for school purposes, even though the money was to be applied towards the erection of a new building. The present legislation relieves them from this necessity only when there is a two-thirds vote of the members present at the meeting of the council for considering the by-law in that behalf. Such a by-law, if not negatived by a two-thirds vote of the council, fixes the municipal district with liability to raise the amount required, and cannot be repealed, as in the case of an ordinary by-law, before it is acted on.

Watson and *J. M. Clark*, for the Oakwood High School Board.

Moss, Q.C., and *D. J. MacIntyre*, for the township of Mariposa.

McMahon, J.] [April 25.

In re THE CENTRAL BANK OF CANADA AND WELLS AND MACMURCHY.

Winding-up Act, R. S. C. c. 129—Deposit made in bank the day it closed its doors—Recovery of same—Fraud.

Where a deposit was made in the bank on November 15th, and it was shown that at a directors' meeting, held the evening previous, the necessity of seeking outside assistance or suspending payment had been considered, and a resolution passed to suspend payment if such assistance were refused, and that when the bank closed on that afternoon, it did not open again, and notice of suspension of payment was given on the following morning, it was

Held, that the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, and the liquidators were ordered to pay the same with interest from the date of deposit.

S. H. Blake, Q.C., for the petitioners.

Foster, Q.C., for the liquidators.

Practice.

Street, J.] [Mar. 12.
Q. B. Division Court.] [May 22.

LOWDEN *v.* MARTIN.

Promissory note—Proposal to renew in part refused—Effect of acceptance of cheque for balance—Judgment under Rule 80.

At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due, and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque.

Held, by STREET, J., in Chambers, refusing a motion for judgment under Rule 80, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors, when tendering it, stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn.

Held, by the Divisional Court on appeal, that on the state of facts presented, the plaintiffs were not entitled to the indulgence of a speedy judgment and execution.

Kappele, for the plaintiffs.

F. W. Garvin, for the defendants.

Rose, J.] [May 22.

BANK OF LONDON *v.* GUARANTEE COMPANY OF NORTH AMERICA.

Payment into Court—Withdrawal of part of claim—Dismissing action—Costs—Rules 170, 218.

The plaintiffs claimed in this action $3,249.36, amount of defalcation of J., and $90.55 for certain expenses connected therewith, in all, $3,339.91. The defendants paid into court $3,273, claiming by their notice of payment in that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and upon notice of a motion under Rule 203 to dismiss the action being served by the defendants, the plaintiffs gave a notice under Rule 170 of withdrawal of balance of their claim.

Held, that the plaintiffs had no power under Rule 170 to withdraw; the portion of Rule 170 relating to the withdrawal of part of the alleged cause of complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper.

Semble, that the plaintiffs not having, under Rule 218, accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action; but the disposition of costs by the local judge who made the order was not interfered with on appeal.

Aylesworth, for the plaintiffs.

H. J. Scott, Q.C., for the defendants.

Law Students' Department.

LOAN OF BOOKS TO STUDENTS BY LAW SOCIETY.

TO THE EDITOR OF THE LAW JOURNAL:

Sir,—At present a rule obtains in the management of that part of the Osgoode Hall Library which has hitherto been available to students, which requires each student, in addition to furnishing a certificate that he is a "fit and proper person" to receive books, to deposit with the Treasurer the sum of $10 as security for their due return.

It is proposed to advance some reasons why this obnoxious rule should be abated.

1. It is a penalty, and virtually prohibits deserving students from the privileges of the library, which is all the more distasteful in view of the fact that students are accorded but too few privileges already.

2. It is unnecessary. The law students are as a class an honourable set of young fellows, who would scorn to make a dishonourable use of the privileges of the library; moreover the books of the library are so stamped to indicate they are the property of the Law Society, that to turn them to personal use is virtually an impossibility.

3. The amount of the deposit should not in any case be so excessive. The average value of the books which are taken out by students does not exceed $5.00, and one book only is allowed out at a time. The imposition of a $10 deposit would seem to indicate that the Society are unnecessarily apprehensive and suspicious for the return of the books.

4. The Law Society has jurisdiction over the proper conduct of its members, among whom are the students, and this can be actively enforced; and if a student, after having given a written receipt for a book, and having de-

posited a certificate signed by the solicitor with whom he is articled that he is a proper person, fails to return a book in due course, the solicitor is morally responsible and the student is in fact responsible, and can be called upon to make a return of the book or its equivalent at once, or be not granted a certificate of fitness or admitted to the Bar.

5. The Law Society has also the powers incident to any corporation where its property is wrongfully diverted. For these and other reasons, which are as obvious as they are cogent, it is respectfully submitted that the imposition of such condition precedent to students being allowed to use that portion of the library which is composed of text-books on the examinations should be abolished, and their privileges restored as formerly. "LEX."

Appointments to Office.

MINISTER OF AGRICULTURE.

Hon. Chas. Drury, Crown Hill, Simcoe, Minister of Agriculture of Ontario (19 May 1888).

JUNIOR JUDGE.

Northumberland and Durham.

J. Ketchum, Colborne, Junior Judge of the County Court, and Local Judge of High Court of Justice (2 May, 1888).

Miscellaneous.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending May 19th and 26th, contain Kaspar Hausar, *Quarterly;* Reminiscences of Cardinal Mazarin, *Westminster;* Islam and Civilization, *Contemporary;* Hymns and Hymnals, and among the Islands of the South Pacific; Fiji, *Blackwood;* Marino Faliero, and Dickens' Characters and their Prototypes, *Temple Bar;* The Topographical Instinct in Animals, and Ruskin's Forge, *Leisure Hour;* Matthew Arnold, Reality and Romance, and The Cashiering of the Tin Soldier, *Spectator;* Old Naval Families, *St. James's;* Boyish Freaks, *Chambers';* Mr. Matthew Arnold's Earliest Publication, *Athenæum;* Scientific Progress in Elementary Schools, *Nature;* Death of Matthew Arnold, and Elements and Meta-Elements, *Times;* with "The Polruan Ferryboat," "The Hermit of Le Croisic," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year), the subscription price ($8), is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for one year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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ACCORDING to our usual custom, there will be no semi-monthly number issued during the months of July, August and September. There is a growing desire to make long vacation as real as possible, and a very sensible thing it is to do so.

THE new Governor-General of Canada, Lord Stanley, of Preston, was formally sworn into office by Chief Justice Ritchie, of the Supreme Court of Canada, at Ottawa, on the 11th inst. An address was presented to the Governor-General by the mayor and corporation of the city of Ottawa. The occasion was an unusually brilliant one. We hope that the sojourn of Lord Stanley in Canada will be a thoroughly enjoyable one for His Excellency, and that the people of this country will look back, after his departure, with as pleasant recollections of his administration as they have of the administration of any of his predecessors.

DURING the past year we referred to an anomaly in the law with regard to bail where a grand jury had found a true bill for felony, and the Crown refused to proceed at the sittings of oyer and terminer at which the true bill had been found. No judge in such a case can grant bail without the consent of the Crown on the ground that he cannot know on what evidence the grand jury have found their bill; whilst, in cases of committal for trial by magistrates, a judge can grant bail, because he can, from the evidence taken by the magistrates on the preliminary investigation, decide whether the prisoner should be admitted to bail. Several learned judges expressed their regret at this state of the law; among them the late Chief Justice Moss, the present Chief Justice of the Common Pleas, Sir Thomas Galt, the late Mr. Justice O'Connor, and to-day, Judge McDougall has to express his regret that in extradition cases, where he would be inclined to accept bail, he is obliged to doubt if he has jurisdiction to do so. The Extradition Acts in force say, in effect, that the proceedings in cases shall be assimilated as far as possible to cases under Criminal Procedure Acts. Under those Acts the judge being only an extradition judge, and his only duty being to decide whether a *prima facie* case (should the alleged offence have been committed in Canada), has been made out and not to weigh evidence. The power to rectify these leaks in criminal law rests with the Dominion Parliament, and we call the attention of the Department of Justice to the fact that amendments could be made in the interests of justice, which have been overlooked in the recent revising of the Statutes of Canada.

PROGRESS OF THE TORRENS SYSTEM OF REGISTRATION.

IN a former number we made some reference to the operation of the Land Titles Act, and the Report of the Master of Titles for the year 1887, presented to the Legislative Assembly at its recent session, enables us to refer more in detail than we then did to the progress which has been made in developing this system of registration of titles. From this report we learn that in the city of Toronto and county of York a very gratifying advance has been made in the amount of land brought under the Act. The volume of business in each year since the Act came into force shows a steady increase. During the first six months of its operation 46 applications were made for registration, of which only 6 were granted, the value of the property registered being $60,250. In the following year, 44 applications were made ; 42 applications were granted, and the value of the property registered was $983,189. In 1887, 51 applications were made, 49 were granted, and the value of the property registered was $1,105,929, making the total number of first registrations up to the end of 1887, 99, and the total value of the property registered, $2,149,368. This, we are inclined to think, is a very satisfactory showing, and says a good deal for the confidence of the public in the advantages of this new system of registration. The fees received in the office during the past year, amounted to $4,307.51, so that there is every prospect of the office of the Master of Titles being very shortly entirely self-sustaining.

Most of the property brought under the Act was intended to be laid off into building lots and placed upon the market, and the proprietors have, no doubt, experienced the manifold advantages the Torrens System presents for handling property of this character effectively, avoiding as it necessarily does so much of the delay and expense which the old system involves.

The idea of registration with a "*possessory title*" merely, does not appear to be acceptable. During the past year no applications were made for registrations on that plan. We suppose people who register, do not see any great advantage in going through all the bother and expense of registration, to find out that, after all is done, their title is still open to question. Naturally enough, if they register their titles at all, they wish to get the full benefits of registration. The only likelihood of registration with a "*possessory title*" becoming popular, is when the fees for that mode of registration shall have been reduced to the smallest possible amount. We do not see why any contribution to the assurance fund should be exacted on any such registration. In such cases the benefits of registration are purely prospective, no present blots or difficulties in the titles are removed; in fact, the title is, to all intents and purposes, just the same after, as it was before registration. The only advantage offered is, the prevention of further difficulties arising in the title, by interposing an official scrutiny on all subsequent dealings with the property. These future benefits should be paid for by fees on future transactions as they arise, and should not be charged for, it seems to us, at the time of the first registration.

The learned Master of Titles very properly draws attention to the heavy expense of advertising. The regulation of charges for advertising in the *Gazette* is, we presume, in the hands of the Government, and so far as advertisements in that paper are concerned, we should think there ought to be no difficulty in cutting them down so as to make them less a burthen. There appears to us to be a slight discrepancy between the report and the schedule attached, for while the report gives the figures above stated, as the total number of applications granted, the schedule appears to show that 138 applications have been granted.

The effect of the extension of the Torrens System to the outlying districts will be watched with interest. We have reason to believe that a large number of titles are being registered; and it is to be hoped that the Government has taken care to appoint careful and efficient administrative officers, so that the new system may not suffer from any want of care in its administration.

THE VALUE OF WOMEN.

WOMEN, whether taken piecemeal or in the whole, whether young or old, are and have long been of uncertain value, and the source to those interested in them of revenue of variable amounts. Slavery is a dead issue, so we are not alluding to the value of the gentler sex in that state, nor, indeed, to their indirect value in a state of matrimony or maternity. In England, early in this enlightened century, a man sold his wife, a child, and some furniture, for eleven shillings sterling; in the same year a butcher sold his spouse by auction, on a market day in Hereford, for one pound four and a bowl of punch; while a few years later another wife was disposed of, at the market-cross at Knaresborough, for sixpence and a quid of tobacco. (*Morning Herald*, March 11th, 1802, and April 16th, 1802; *Morning Post*, October 10th, 1807.) And, as we understand it, the records of Arapahoe County, Col., show that in May, 1882, in consideration of $75, "and the further valuation of one yellow dog," John Howard sold, devised and quitted claim unto John Doe all his right, title and interest to and in his wife, Rebecca Howard, together with all and single the improvements and hereditaments therein and thereon.

But nowadays it is not necessary to sell one's life's partner, or infant prodigy, to make money; to speak figuratively, to do so is to kill the goose that lays the golden eggs; all that is requisite now is to arrange matters so that the wife or bairn tumbles in the street, or is injured by a railway train, or hit, or hurt, by some one who has means at his command. We wish to consider what money may be made by the fair sex, not by preaching nor practising, not by selling nor teaching, not by telephoning nor caligraphing, but by what will occur in the best regulated families, namely, accidents and negligences.

Touching a woman's face against her will is an expensive luxury. Miss Cracker was awarded by the Wisconsin courts $1,000, against the Chicago and North-Western Railroad Company, because a conductor had presumed so to mis-

conduct himself as to salute her on her cheeks. (36 Wis. 657.) There is no record of any man being given damages against a woman for such an assault; and yet those who delve into statistics say that as many men are kissed by women as there are women kissed by men. It might be advisable for railway companies to employ all their homely conductors on their freight trains, giving their handsome ones the run of their passenger coaches; for the kiss of an Adonis, for the nervous shock produced by the contact of his Cupid-shaped lips, or the sweet titillations caused by his neatly curled mustachios, could not be such an aggravated assault as the rough kiss of one *monstrum, horrendum, informe.*

The habit of expectorating in every direction is a vile one, and may become an expensive one; we would that it always was punished with many fines and penalities. Cuspidors may be costly, but it is sometimes cheaper to use them. A man, or at least a curiously forked radish with bandy legs, and a mind as crooked and ugly as his legs, used a lady's face for a spittoon upon one occasion, and for that insulting act he had to pay $1,200, the jury awarding that sum and the judges thinking it not unreasonable; and so say we. This was in Wisconsin. In Illinois, another being, yclept a man, had had the pleasure of giving $1,000 for spitting in a gentleman's face in public. The jury showed a praiseworthy discrimination in charging more for the defilement of a lady's face than for that of a man. (61 Wis. 450; 63 Ill. 553.)

The judges of the land apparently think more highly, and are more careful of the faces of ladies than of their heads, for in Illinois it was decided that $1,700 was too much to make a man pay for hitting a woman on the cranium with a hatchet. The court tried to cover up its lack of gallantry by saying that she had been very provoking and had not been hurt much. (87 Ill. 242.) The woman had evidently blown up the man before his blow came down on her.

In old days, in England at all events, the money value of a pair of shoulders and back was not high, however valuable they might have been æsthetically or socially; that was Mrs. Dudley's experience. She tried to drive under an archway nine feet nine inches in height while sitting upon the top of a coach eight feet nine inches from the ground; not unnaturally there was a difficulty in her doing this the first time she attempted it, and she was permanently injured about the parts named, and for these hurts she received only one hundred pounds. (1 Camp. 167.) Each vertebra of a lady's spine is very valuable, although she has quite a number of them, and the spine as a whole—weak as it often is—has frequently been a source of great revenue, especially to those who have travelled. Mrs. Fry, a substantial British matron, jumped three feet off the top step of a railway carriage to the ground, and thereby jarred her vertebræ. The jurymen to whom she appealed ordered the railway company, because the car had not been stopped in a proper place, to pay her £500; and the judges to whom the company complained of the jury's valuation, agreed with the jurors of our Sovereign Lady the Queen, and enforced the verdict. (18 C. B. N. S. 225.) In the Province of Ontario, Mrs. Elizabeth Toms got $1,000 out of a town for an injury to her spine; the first jury wanted to give her $750, the next said $2,000, but the court deemed $1,000 the correct thing. Mrs. T.'s horse had shied at some new boards on a

bridge and backed up against the railing, which, breaking, let her fall into the water below. In Illinois, Miss Herz was allowed to keep $7,500 as compensation for a fracture of her lowest vertebra, which produced paralysis; the accident was caused by a fall through a defect in a sidewalk. A school ma'am, Parks by name, got $8,958 for a permanent injury to her spine. And down South, a lady was allowed by the court $6,000 against a street-car company for degeneration of the spinal cord induced by a fall, caused by the negligence of the driver, when she was alighting. (37 U. C. R. 100; 87 Ill. 541; 88 Ill. 373; 35 La. Ann. 202.)

Miss Sweely fell, in the town of Ottawa, because of the wretched state of a sidewalk. Her arm was so injured that the muscles gradually wasted away, until she completely lost the use of it; and the shrivelling up was accompanied by incessant pain. She sued the town, and the jury gave her $3,200, and the court thought that none too much. And, where the arm of a juvenile, of the immature age of five, was so fractured that it was permanently disfigured, though the court considered $6,600, the award of a New York jury, far too great, yet the railway company that caused the injury was ordered to pay $3,000 as compensation. A Massachusetts lady was badly used up in a railway accident; she lost one arm, and the other was rendered useless; her health and memory were impaired, and she was thenceforth in constant pain. The jury who investigated her injuries, considered her form divine very valuable, and awarded her $10,000 damages. The railway company thought this sum out of all proportion to the value of other bodies and arms, and so craved from the court a new trial, and they got it. The second jury had a still higher opinion of Mrs. Shaw, the lady in question, or, at least, of those parts of her that were injured and gone, than the first jurymen, and gave her $18,000 damages. Again the unfortunate company (which, though it had no soul to be damned, still had shareholders to damn) rushed to the court for relief, and the judges, doubtless older men and more cognisant of the vanity and frailty of women than the jurors, ordered a new trial. Again a dozen men weighed in the balances of their minds, suspended on their oaths, the sighs and the tears, the aches and the pains, the lost bones and flesh, of the persistent but now sadly defective woman; and these good men and true said that $22,500 would be the right amount to give for compensation. The court then gave way, declining to interfere any further, and the poor company had to submit. What these jurymen would have valued the whole of Mrs. Shaw at, when in her prime, heaven only knows. She must have been a *rara avis*. (65 Ill. 432; 50 N. Y. Super. Ct. 220; 8 Gray, 45.)

Nurse Jones stumbled on a broken board in the sidewalk, fell and fractured her right wrist so that she could not mix up the food for her little darlings, or do her duty in a proper manner in that state of life in which she had been placed; therefore the city of Chicago had to pay her $1,000. As much as $4,700 has been allowed for the loss of a hand; but then, women's small finger-tips have eyes. (66 Ill. 349; 71 Ga. 406.) Doubtless ladies have ofttimes valued the hand of a man at a higher figure, and for broken hearts feminine, caused by vanished hands masculine, have recovered heavy sums from susceptible jurors, but this $4,700 was received by one of the fair for the loss of her own hand.

Ladies who have had their nether limbs injured have, according to the records of the courts, been rather unlucky in their actions for damages; perhaps because the style of dress in vogue among mature women hides from view these most useful appendages, thus inducing judges and jurors to consider that the kind of upright possessed and used by the females of the *genus homo* is immaterial. A dog, at a railway station, took part of the leg of Mrs. Smith between his lips and teeth and nipped it. The jury gave her a verdict of £50 against the railway company; but the court would not let her keep even that small *solatium*, holding that the company was not guilty of negligence in allowing the canine to be on their premises. (L. R. 2 C. P. 4.) A Canadian woman, while walking through a town, in that the season when the wind wails for the summer dead, fell and broke her leg, just above the ankle. The jury who sat on her case assessed the damages against the town at $800; but a new trial being ordered, the second jury deemed $150, besides the amount of the doctor's bill, all she was entitled to. A Massachussets lady spiritualist, however, recovered $5,000 against a railway company that broke her leg, and the court would not interfere to assist the company in getting the amount lessened. Perchance, this one used spirits on the jurors and thus got them high. A master in Louisiana had only to pay $1,000 for his servant's negligence in driving a waggon against a woman, fracturing her thigh, shortening one leg, and causing her to be confined motionless for six weeks. (25 C. P. Ont. 420; 27 *Ib.* 129; 109 Mass. 398; 36 La. An. 966.) And yet, men's lower limbs are valued high. One man, who had his thigh broken in two places, got $7,000; another, in Kansas, got $12,000 for injuries which necessitated the amputation of his leg; while one in New York got that handsome sum for an injury which only kept him in bed six weeks, suffering great pain, and away from his business several months, and left him lame. In Iowa the courts considered that for keeping a man of fifty-two in bed for a month and a half, and shortening one leg only two and a half inches, $8,000 was not too much to pay; but, in Illinois, $10,000 was held to be too much for shortening the leg of a man, of three score and ten years old, a couple of inches. (64 Ia. 568; 33 Kan. 298; 64 Barb. N.Y. 430; 61 Ia. 452; 12 Ill. App. 561.) Verily, judges and juries seem to discriminate against women on this point; perhaps it would be well for legislatures to interfere and fix the price of legs, as they used to fix the prices of wheat or scalps.

In Canada, when the population was smaller than it is now, men valued the legs of their fellow-men at a fancy figure; a bachelor got a jury to give him a verdict of nearly $25,000, for the loss of one of his, and a few other hurts. The judges, however, interfered and sent the matter back for another jury to sit upon. This was well matched in Montana, where a foot was valued by a jury at $20,750; but the court considered that at least $10,000 too much. (5 U. C. C. P. 127; 5 Mont. 257.) In Texas, at times, children's legs are rated as high as children's lives are in the North. One of Simpson's bairns, aged twelve, recovered $3,500 from the Houston & Texas Railway, which had crushed her leg so that it was permanently injured; and that was exactly the same sum that a New York jury gave against the New York Central for the killing of a little damsel of thirteen summers. (60 Tex. 103; 34 Hun. N. Y. 80.)

Women who have had their time wasted through injuries that have been inflicted upon them, and have thus been prevented getting their usual earnings, while entitled to good compensation therefor, must not expect to get a fortune out of the guilty party. Mrs. Langley was laid up by an accident, and was deprived temporarily of earning $9 a week, as was her wont. Twelve jurymen, with that lavish liberality often noticeable in people who are not spending their own money, offered her as compensation $6,000 of the money of the railway company that hurt her, but the judges intervened and said that was far too large a sum. And where a railway company carried a lady of the name of Marshall beyond the station at which she wished to alight, and she had to pay $1.50 to reach her desired haven, and lost three hours of her valuable time in getting there, the judges would not let her keep the $750 which the jurors of Missouri in their ardor and gallantry gave her. Too much, the impassive judges said. Yet in such a case the fair claimant may, to influence the verdict of the jury, show that there was no conveyance to be had at the place where the railway left her, that she had to walk several miles, over dusty roads, spending several hours tramping through the night; that she got wet crossing a creek, was chased by dogs, and otherwise frightened, and so with heat, and wet, and fright, and fatigue, was made sick. (48 N. Y. Super. Ct. 542; 78 Mo. 610; 94 Ind. 179.)

What sums sad and sorrowing survivors have received when women have been killed is too mournful a subject to touch upon just now.

R. VASHON ROGERS.

COMMENTS ON CURRENT ENGLISH DECISIONS.

Law Reports for May continued.

MARITIME COLLISION—NEGLIGENCE IN BOTH SHIPS—DAMAGES FOR LOSS OF LIFE—LIABILITY OF OWNERS—LORD CAMPBELL'S ACT.

Turning now to the appeal cases, the first is *Armstrong* v. *Mills*, 13 App. Cas. 1, in which the House of Lords affirm the decision of the court, which is reported as *The Bernina*, 12 P. D. 58, noted *ante* vol. 23, p. 143. It may be remembered that the action was brought to recover damages under Lord Campbell's Act for the loss of life occasioned by the collision of two steamships, the *Bushire* and *Bernina*. The collision occurred through the negligence of the masters and crews of both vessels, one of the deceased persons was a passenger, and the other, one of the crew of the *Bushire*, neither of whom had anything to do with the negligent navigation. The Court of Appeal held that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire*, and that their representatives were entitled to recover the whole of the damages against the *Bernina*, the admiralty rule as to half damages in case of collision not being applicable to actions under Lord Campbell's Act. This decision the Lords affirmed, overruling, as the Court of Appeal had done, *Thorogood*

v. *Bryan*, 8 C. B. 115, and *Armstrong* v. *Lancashire & Yorkshire Railway Company*, L. R. 10 Ex. 47. The theory that a passenger upon a public conveyance becomes so far identified with the owner and his servants that if any injury results from their negligence he must be considered a party to it, is now completely exploded.

PRACTICE—IMPRISONMENT FOR DEBT—JUDGMENT SUMMONS—ORDER FOR COMMITMENT OF DEBTOR—DEBTORS' ACT, 1869 (32 & 33 VICT. C. 62), S. 5. (R. S. O. C. 51, S. 240).

In *Stoner* v. *Fowle*, 13 App. Cas. 20, the House of Lords reversed the decision of the Court of Appeal reported as *Reg.* v. *Judge of Brompton County Court*, 18 Q. B. D. 213. Judgment was recovered in a county court and an order made for the payment of £20. Default having been made in payment, a judgment summons was taken out, and the judge having heard evidence and being satisfied as to the defendant's means, made an order to commit him for ten days, but directed that the warrant be suspended if the debtor paid instalments of £4 a month, the first payment to be made in fourteen days. It was held by their Lordships that the order was in reality an order for commitment in respect of the past default in payment of the £20, and not an anticipatory order for commitment in respect of any future default, and that being so, the order was valid under the Debtors' Act, 1869, (32 and 33 Vict. c. 62), s. 5, (see R. S. O. c. 51 s. 240).

RAILWAY COMPANY—COMMON CARRIERS—PASSENGERS' HAND-LUGGAGE—DELIVERY TO PORTER—NEGLIGENCE.

The Great Western Railway Company & Bunch, 13 App. Cas. 31, is an instance of the pertinacious way in which railway companies are prone to litigate cases. The sole cause of action was the loss by Mrs. Bunch of her Gladstone bag, which she left in charge of a railway porter at a station for a few minutes while she went to meet her husband and get her ticket for a train about to start. Ten minutes afterwards she returned to the platform, and the Gladstone bag had disappeared. The Court of Appeal held the railway company liable (17 Q. B. D. 215), and the House of Lords affirmed the decision. Mrs. Bunch may congratulate herself that her protracted law suit has had a more successful issue than did that of Mr. Jackson (3 App. Cas. 193), who lost not only his thumb, but his case as well, with all the enormous costs it must have involved; had all the learned law lords, however, been of the same opinion as Lord Bramwell, Mrs. Bunch might have been in a similar position to Mr. Jackson.

INFANT—MARRIED WOMAN—POST NUPTIAL SETTLEMENT—INFANTS' SETTLEMENT ACT (R. S. O. C. 44, S. 32).

Seaton v. *Seaton*, 13 App. Cas. 61, is a case which was known in the courts below as *Buckmaster* v. *Buckmaster*, in which the Court of Appeal (35 Chy. D. 21), held that neither the sanction of the court nor the effect of the *Infants' Settlement Act* (R. S. O. c. 44, s. 32), could make a post nuptial settlement of the wife's reversionary interest in personalty binding on her, and that no acts of ac-

quiescence and confirmation could have that effect unless they amounted to an actual disposition by her, of the property (while discovert), to the trustees of the settlement. This decision we noted *ante* vol. 23, p. 249, and it is now affirmed by the House of Lords. In short, the case establishes that the *Infants' Settlement Act* merely removes the bar of infancy, but does not enable an infant married woman to make a valid conveyance of property, which she could not validily convey if she were not an infant.

ILLEGAL TRANSACTION—RATIFICATION BY LIQUIDATORS.

La Banque Jacques Cartier v. *La Banque D'Epargne de Montreal*, 13 App. Cas. 111, is an appeal from the Court of Queen's Bench for Quebec, in which the Judicial Committee came to the conclusion, overruling the court below, that the liquidating authorities of a bank in liquidation have no power to ratify or acquiesce in a transaction, so as to render the bank liable to pay a debt it never owed.

PRACTICE—VERDICT OF JURY.

In *Commissioner of Railways* v. *Brown*, 13 App. Cas. 133, the Judicial Committee decided that when there is evidence on both sides properly submitted to a jury, and the verdict of the jury is not unreasonable, nor unfair, nor dissented from by the judge who tried the case, it ought not to be set aside, and the decision of the court below setting aside a verdict, under such circumstances as being against the weight of evidence, was reversed.

INCORPORATION OF RAILWAY CO.—VALIDITY OF MUNICIPAL BY-LAW—CONDITIONS PRECEDENT—34 VICT. C. 48 (O.)—37 VICT. C. 43 (O.).

The Grand Junction and Midland Railway of Canada v. *Peterborough*, 13 App. Cas. 136, is a decision of the Judicial Committee on an appeal from the Court of Appeal of this Province. The action was brought by the railway company, to compel payment of a bonus, which had been authorized to be paid to the company by by-law. The defendants contended *inter alia* that the by-law was invalid. 2. That the plaintiffs were not the company referred to in the by-law. 3. Non-performance of conditions precedent. The Judicial Committee dismissed the appeal, holding that the by-law was valid, and that the company was by virtue of 34 Vict. c. 48 (O.), and 37 Vict. c. 43 (O.), entitled to the benefit of the by-law, but, that owing to the non-performance of the conditions precedent, the company was not entitled to recover, and the judgment of the Court of Appeal of Ontario, dismissing the action, was consequently affirmed.

ACTUAL TOTAL LOSS—SALE OF SHIP BY COURT—SALE FOR LESS THAN SALVAGE—DERELICT.

Cosman v. *West*, 13 App. Cas. 160, is an appeal to the Judicial Committee, from the Supreme Court of Nova Scotia. The action was upon policies of insurance on a ship and freight, as for a total loss. The ship had been abandoned by the crew in a sinking condition, having been purposely scuttled by them, but had been subsequently taken possession of by salvors, and towed into port,

and ordered to be sold by order of the Admiralty Court, and at the sale realized less than the sum allowed for salvage. Their Lordships reversed the decision appealed from, and held that assuming the possession by salvors of a derelict vessel to be only a constructive total loss, yet the subsequent sale constituted an actual total loss, of both ship and cargo, and that it was not necessary to constitute a total loss, that the ship and cargo should have been actually annihilated; it was sufficient to constitute such a loss, that by an adverse valid sale, and legal transfer, the owner's right of property and possession has been transferred to a purchaser, in consequence of a peril insured against.

NEGLIGENCE—NERVOUS SHOCK RESULTING FROM FRIGHT—DAMAGES TOO REMOTE.

The only other case to which we think is necessary to draw attention is *Victorian Railway Commissioners & Coultas*, 13 App. Cas. 222. This was an appeal from the Supreme Court of Victoria. The action was brought to recover damages for negligence under the following state of facts: The gate-keeper of the defendant's railway company had negligently invited the plaintiff to drive over a level crossing, when it was dangerous to do so. An actual collision with a train was avoided, but the plaintiff claimed damages for physical and mental injuries sustained by the fright, and the jury assessed damages therefor; but the Judicial Committee was of opinion that such damages were too remote, and not a natural and reasonable result of the defendant's act, and the appeal was consequently allowed, and the action dismissed.

Reviews and Notices of Books.

The most recent of the Text-Book Series of the Blackstone Publishing Company, of Philadelphia, is "Leading Cases in Equity," by Thomas Brett, with notes on American cases by F. S. Dickson. This is a valuable addition to the series.

A Compendium of the Law of Torts, specially adapted for the use of Students. By HUGH FRASER, M.A., LL.M., of the Inner Temple, Barrister-at-Law. London: Reeves & Turner.

This little book claims to be nothing more than rough notes of the outlines of the author's lectures delivered at Liverpool and Newcastle-upon-Tyne. It was compiled, in the first instance, with the object of assisting those of the author's own pupils, who wished to enter on the wider course of study indicated in his lectures. It is clear and concise in its statements, the topics treated of are well arranged, and the numerous references to cases, and to other works dealing at large with each subject under discussion, will prove helpful in obtaining more detailed information on any point of inquiry than can be given in an outline.

The Bills of Sale and Chattel Mortgage Acts of the several Provinces of the Dominion of Canada, with Introduction and exhaustive Notes. By JOHN A. BARRON, Barrister-at-Law. Second edition. Toronto: Carswell & Co.

The first edition of this book is so well known that it is scarcely necessary for us to do more than call attention to the fact that a second one has been issued. The portion of the work relating to the law of Ontario is based on R. S. O. 1887, c. 125, but it contains also some other Statutes of the Province, and of the Dominion, which affect bills of sale and chattel mortgages. The advantages of having this treatise brought down to the present date are manifest. The law of the other Provinces of Canada is also given. The annotations are exhaustive, and we are safe in saying that this edition will meet with even a more favourable reception from the profession than the former. The appendix of forms is a useful feature of the work.

Type, paper, printing, and general appearance reflect credit on the publishers.

The Mechanics' Lien Act, being the Revised Statute of Ontario (1887), *chapter* 126. *With Annotations and additional Forms of Proceedings thereunder.* By GEORGE SMITH HOLMESTED, of Osgoode Hall, Barrister-at-Law, and Registrar of the Chancery Division of the High Court of Justice for Ontario. Toronto, 1888, pp. xiii. 166.

Mr. Holmested has chosen an appropriate time for the publication of this compact and comprehensive little work on a difficult and important subject. Some years ago, when the Mechanics' Lien Act was of recent date, and had not been to any great extent illustrated by judicial decisions, he published a smaller work on the subject, which was found of considerable value by the profession, and has been frequently quoted with approval in the Reports. Since that time the Legislature has been busy in amending and extending the original legislation, the courts have been still busier in interpreting, not always to their own satisfaction or in harmony with each other, the complicated enactments by which our provincial Solons have endeavoured to safeguard the rights of labour which are so dear to them, and the result has been a state of things which rendered it highly desirable that a fresh attempt should be made to furnish the profession with "light and leading" in what are confessedly dark and thorny places. For such an attempt, the recent consolidation of the various statutes on this subject in one Act supplied a convenient basis, and Mr. Holmested has done wisely in deferring the publication of his work until such a basis could be secured. The form chosen by him is that which has been so much in vogue with our Canadian legal writers, viz., a reproduction of the Act with annotations following each section. Much labour and research have evidently been expended in these annotations, which are characterized by clearness of statement and fulness of reference, and if the reader is sometimes left in doubt as to the means of reconciling conflicting

decisions, he has the satisfaction of finding that materials have been afforded him for forming an opinion of his own, while points of conflict and difficulty have been brought into clear relief, and sometimes (though this is not always possible) a path of safety pointed out. In this connection we may refer to the remarks made on *Makins* v. *Robinson*, *McVean* v. *Tiffin*, and other cases bearing on the effect of prior registration as between owners, mortgagees, and lien-holders (pp. 8, 9, 10, 56 and 57), which will be found to contain a valuable and suggestive discussion of what is perhaps pre-eminently the *vexata quaestio* of Mechanics' Lien Law. The author, though he speaks with caution on this point, seems to agree with the view expressed by Mr. Armour in his work on Titles (p. 166), that the line taken by recent decisions is more favourable to the owner and mortgagee as against the lien-holder than the intention of the Legislature. If such be the case, we cannot say that we regret it. Mr. Holmested refers (p. 3), to an American case as establishing the proposition that, "when a lien attaches, the statute, being remedial, is to be liberally construed," but on a point of this kind we should have preferred a reference to such *dicta* of our own judges, as, for example, those which speak of this "remedial" statute as being "very oppressive upon the owners of property," and, "however equitable in intention, calculated to make one man pay another man's debt": *McPherson* v. *Gedge*, 4 O. R. 259, 261. Most persons, with the possible exception of Knights of Labour in the workshop and the Legislature, will agree with Mr. Justice Patterson in thinking that this Act should be construed "so as not unnecessarily to increase its unavoidable interference with the power of an owner to deal with his property, or of an incumbrancer to benefit by his security": *Bank of Montreal* v. *Haffner*, 10 O. R. 602.

There will be found in the work under review references to many English and American authorities, and to all important decisions in our own courts on the matters treated of, including some which are not reported, and such recent cases as *Reinhart* v. *Shutt*, and *Wanty* v. *Robins*, which though they had not appeared in the reports at the time of publication, are noted wherever appropriate. One feature which will be found particularly useful by the practitioner is the appendix of additional forms of proceedings. This appendix contains 35 pages, embracing a variety of forms which cannot fail to be of the greatest service, the value of which is further enhanced by a number of foot-notes on points of practice. In conclusion, we may say that this little book is well-printed and tasteful in appearance, doing credit in these respects to the author's publisher, who is apparently the author himself, and that it possesses the additional merit of a full and well-arranged index.

Notes on Exchanges and Legal Scrap Book.

DETACHED COUPON.—A case which turned on the right of a passenger to present a coupon detached from the ticket-book in payment of his fare has been decided by the Supreme Court of Massachussetts: *Boston and M. R. Co.* v. *Chipman.* The ticket-book originally contained one hundred such coupons, and on each was printed the words, "Not good if detached," and on the cover of the book, "Coupons are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket." The defendant refused to exhibit his ticket-book or to pay his fare in any other manner than as aforesaid. At the trial he offered to prove that it was customary for conductors to receive coupons without seeing the ticket-book, but the evidence was excluded. The court held that the contract was a reasonable one, that there was no evidence that the company had rescinded or waived any of the terms or conditions of the contract, and they were, therefore, entitled to judgment.

SUBROGATION TO RIGHTS OF MORTGAGEE.—In *Scriven* v. *Hursh*, decided by the Supreme Court of Michigan, H. made a mortgage on certain of his lands to J.; afterwards he made a second mortgage on the same lands to G., in which the first mortgage was recognized. This second mortgage was foreclosed. To save the redemption, the mortgagor, who had conveyed the premises to his wife, borrowed money of the first mortgagee, and as his wife's agent, under a power of attorney, mortgaged the property to him for the entire sum included in both the first and second mortgages. The wife knew and approved of this. The third mortgage was bought by S., who gave full value for it and who also paid the taxes on the land. This mortgage was subsequently declared to be void, on the ground that the husband had exceeded his authority in executing it. It was held that S., as against a purchaser of the land from the wife with notice, was entitled to be subrogated to the rights of the second mortgagee to the extent of what he had paid for the mortgage and laid out in taxes.

IN *Walker* v. *Grand Rapids Flouring Mill Company*, in the Supreme Court of Wisconsin, the defendants were a corporation and the owners of a flouring mill. A. agreed, for a certain consideration, to repair the mill and put in new machinery. The plaintiffs sent a machine to A., consigned to themselves and in the care of another, to have it tested. The machine was secured to the floor, and connected with the main shafting of the mill by means of belts and pulleys. The defendants had notice that the machine was the property of the plaintiffs, and had paid nothing for it. It was not sold to any one, and no agreement had ever been made by the plaintiffs with any one for its sale. It was contended on

behalf of the defendants that because the machine was entrusted to A., and he placed it in the mill of defendants under a contract to put such a machine there, the plaintiffs should not be allowed to set up a claim to the ownership of the machine. There was nothing to show that the position of the defendants was in any way prejudiced by the claim of the plaintiffs, for the former never paid anything. It was held that the machine had not become annexed to the building so as to become a part thereof or to lose its identity, and the plaintiffs were not estopped from recovering for its conversion by reason of having entrusted it to the care of another person.

TESTAMENTARY ECCENTRICITIES.—The following notes of peculiar wills appear in the *English Law Journal:* A few days since was chronicled the case of a hard-hearted uncle who left his nephew a fortune on condition that he should never indulge in his favourite occupation of "reading newspapers." Many will pity the legatee, but few would refuse "landed estate, houses, and money in the funds," even though fettered by such a selfish condition. As the subject of testamentary eccentricities is a generally amusing and instructive one, permit us to give our many readers a few remarkable instances of the whimsicalities of testators. An American lawyer once made a very thoughtful bequest, thus: "I am informed there is a society composed of young men connected with the public press, and, as in early life I was connected with the papers, I have a keen recollection of the toils and troubles that bubbled then, and ever will bubble, for the toilers of the world in their pottage cauldron, and, as I desire to thicken with a little savoury herb their thin broth, in the shape of a legacy, I do hereby bequeath to the New York Press Club, of the city of New York, 1,000 dollars." A few such "windfalls" for our own Newspaper Press Fund would be very acceptable. Palgrave's "House of Commons" contains a note of a very curious bequest. It is to the effect that many years ago a large estate was left to Mr. Asgill upon condition that he should undertake to pay not one of the debts which the owner of the estate had left behind him. Mr. Asgill was an M.P. He took possession of the property, called the creditors together, read the will, and told them he would obey it strictly. He kept his word.

EVIDENCE IN FORGERY.—A case of a practical test in evidence is *State* v. *Henderson*, 29 W. Va. 147, a prosecution for forgery, where witnesses, acquainted with the genuine signature in question, were permitted to write one of its letters in presence of the jury, as they thought it was made, and the jury were permitted to compare it with the simulated signature. The court said: "The objection urged to this is, that it is a comparison of handwriting by the jury, which it is alleged is not allowable, and the following authorities are cited: *Rowt* v. *Kile*, 1 Leigh, 216; *Burress'* case, 27 Gratt. 946; *Clay* v. *Alderson*, 10 W. Va. 50. It is true, as these cases hold, that it is not allowable to lay other proved but not admitted specimens of the party's handwriting before the jury for the purpose of

permitting them to judge by a comparison thereof with the signature in question, whether the said signature is not genuine. But here no such thing was permitted. The jury was not asked to compare different signatures of Leonard with his name signed to the alleged forged receipt. The witnesses were only asked to write an 'L' as they thought Leonard wrote it, so that the jury could the better understand the testimony. If a jury do not have a clear idea of the location of a place where an act is alleged to have been done, no one doubts the right of a party to have a witness describe the place, and by a word painting of it and its surroundings make its location clear to the minds of the jury. What objection then can there be to the permitting of the witness to make in the presence of the jury a diagram of the place to enable the jury the better to understand the witness? There can then be no valid objection to the permitting of the witnesses in their attempt to describe how Ebenezer Leonard wrote the letter 'L' to illustrate their meaning by writing the letter themselves, so that the jury could see whether or not it was in fact different from the alleged simulated 'L.'"—*Albany Law Journal.*

RIGHT OF TRAVELLING ON ICE.—The Supreme Judicial Court of Maine, in *Woodman* v. *Pitman et al.*, reported in the *American Law Register*, decided that neither the right of travelling upon the ice of a river affected by the tide, nor the right of taking ice therefrom, is an absolute property right in any person. Both are natural or common rights, belonging to the public at large. Though such rights are theoretically open to all, those persons who first take possession of them are entitled to their enjoyment without interference from others, such rights being the subjects of qualified property by occupation. Each right is relative or comparative, and, when conflicting with the exercise of the other right, is itself to be exercised reasonably. What would be a reasonable exercise of the one or the other, at any particular place, must depend largely upon the benefits which the people at large are to receive therefrom. The right of passage over the ice for general travel is not the paramount right at such a place as the Penobscot River at Bangor, and for some distance below, where the great body of the ice is annually harvested for the purposes of domestic and foreign trade; the traveller's privilege at such place being of trifling consequence compared with other interests conflicting with it, and beset with difficulty and danger during the ice-cutting season. It is the duty of those who appropriate to their use portions of a public river for ice-fields to so guard their fields, after they have been cut into, as not to expose to danger any persons who may innocently intrude upon them. Although the defendant may have been in fault in leaving his ice-field unprotected against accident, yet, where the plaintiff's servant, knowing the customs of ice-gatherers, wilfully left the usual driven track, and drove over a bank of snow by the side of the defendant's ice-field, knowing that he was going upon an ice-field, and that it was dangerous to do so, he was guilty of contributory negligence, and the plaintiff cannot recover for injuries to his property.

BOOKS OF ACCOUNT AS EVIDENCE.—In *Missouri Pac. Ry. Co.* v. *Johnson*, Texas Supreme Court, April 27, 1888, it was held that where the plaintiff and his clerk testify that one or the other of them weighed the wheat taken in at plaintiff's elevator, and set down the correct weight in the "scale-book," from which tickets were torn off and given to the farmers, and from the stubs correctly transcribed the weights into the day-book, such book is admissible in evidence to prove the amount of such weights, the "scale-book" being lost. The court said: "The introduction of shop-books as original evidence of indebtedness grew out of the necessity of affording small shop-keepers and dealers who keep no clerks the means of proving their accounts. Not being allowed to testify at common law in their own cases, they were permitted to introduce their books of original entries in order to establish the items of their claim, after having sworn to their correctness, and proved by the testimony of disinterested persons who had dealt with them that their books were correctly kept. As to what are books of original entry there has been some diversity of opinion among the courts. It seems, however, pretty well established that the first permanent records of the transaction by the creditor are to be deemed original entries if made within a short time after the transactions themselves, although the item may have been previously entered, as a temporary assistance to the memory, upon some slate, book, paper, or other substance not intended to be preserved. In an old case this court admitted the rule generally recognized in the courts of this country, but strongly animadverted upon it as a dangerous innovation of the principles of the common law, and refused to extend it in case of a merchant's account beyond such articles as are usually sold by a merchant in course of his business. *Cole* v. *Dial*, 8 Tex. 347. It is usually confined to accounts for labour performed, or to goods sold by regular dealers in merchandise. Since the passage of the statute which permits parties to testify in their own cases there is less reason for the extension of the doctrine than before existed. But we are of the opinion that so much of the account from the books introduced in this case as pertained to the wheat shipped from McKinney was admissible on a different ground. The witnesses as to these transactions testified of their personal knowledge. They swore, in substance, that they weighed the wheat, or saw it weighed, and that the weights were correctly set down in the scale-book, and correctly entered in the account-book from the scale-book. Such entries as were not made by the one were made by the other, and each testified that the entries made by him were correct. We think this was legitimate evidence, tending to establish that the weights shown in the book of accounts were correct. A witness who takes a memorandum of a transaction, and copies it himself, is certainly competent to prove the copy if the original be lost. If he takes down a correct statement of the weights of small parcels of grain, and adds them up, and enters them in an account-book at the end of each day, as appears to have been done in this case, he ought to be able to say whether the entries last made are correct or not, and we do not see why he should not be permitted to testify to the fact. If he knows that the numbers were correctly set down in the original memorandum, and correctly added, and the sum or sums correctly

entered in a book of accounts, the conclusion is inevitable that the last entry correctly represents the total. It may be that, as a general rule, if a witness, after refreshing his memory from a contemporaneous writing, can speak from his memory, the writing is not admissible in evidence. But if the writing be an account consisting of a mass of figures, he may refer to the paper if he knows it is correct, and testify from it; and we see no reason why it should not be introduced—not as original evidence, but as showing distinctly the specific account to which he has testified. *White* v. *Ambler*, 8 N. Y. 170; *Insurance Co.* v. *Weide*, 6 Wall. 680; Abb. Tr. Ev. 321. Here it was proved that the accounts which were offered from the books consisted of entries made from the scale-book at the end of each day's transaction, and that the scale-book had been lost or destroyed; and we are, therefore, of the opinion that the book was properly admitted as tending to prove the weights of the wheat which was shipped from McKinney." —*Albany Law Journal.*

LIMITS OF THE PRIVILEGE OF PUBLIC WRITERS.—In the Queen's Bench Division, on April 18, before Baron Huddleston and a special jury, Samuel Peters, Secretary of the "Workmen's National Association for the Abolition of Foreign Sugar Bounties," sued Charles Bradlaugh, M.P., to recover damages for having, on December 3, 1887, falsely and maliciously printed and published of and concerning him in the *Times* newspaper the words following: "I had, from my place in Parliament, offered to prove that leading Conservatives, including Lord Salisbury, had given cheques to promote the meetings of the unemployed which had preceded, and, as I believe, aided in the riots of Trafalgar Square. I am ready directly Parliament meets, to trace several cheques signed by leading members of the Conservative party, including one signed by the Marquis of Salisbury, some of which were payable to S. Peters, all of which I believe passed through the hands of S. Peters, and which were used in connection with the so-called fair trade meeting of the unemployed which preceded the riotous meetings in Trafalgar Square." The defendant pleaded privilege and justification. Baron Huddleston, in summing up, explained to the jury that anything which reflected upon the character of any one, if written and published, constituted a libel, and proceeded to trace the law relating to libel before and after Fox's Act. They, therefore, would have to look at the words of the libel and say whether or not they bore the construction put upon them by the plaintiff. No doubt it was right that public writers should be allowed some extent of comment, and it would not be right to be too nice on such points. But the facts commented upon must be true. The first question was, therefore, Was this statement of the defendant's true? If it was, then Mr. Bradlaugh was entitled to say that it was privileged. But so long as he continued to administer the law he would most strenuously uphold that it was no defence in an action for libel for the defendant to say, "Oh! I *bona fide* believed what I wrote was true," when the words reflected upon the plaintiff's character. The learned judge referred to *Campbell* v. *Spottiswoode*, 32 Law J. Rep. Q. B. 185, as a case that was always recognised and fol-

lowed by our courts. If they were satisfied that the imputation was true, Mr. Bradlaugh's contention of honest belief might avail, but if not, no amount of such sincerity would avail him. Having cautioned the jury against political bias, the learned baron proceeded to observe that at the time in question there had been public meetings held in Trafalgar Square, and Mr. Bradlaugh wrote the letter complained of, and it was published in the *Times* of December 3, 1887. The learned judge asked the jury whether they thought the libel as set out in the pleadings supported the meaning put upon it by the plaintiff, and constituted a grave charge against him. If it did, then were they satisfied that the charges were substantially true? He did not think that anyone could say, whatever his politics, that there was any harm in the plaintiff associating with others and raising subscriptions in order to ventilate their particular grievances. That was what Peters said he was doing. But Mr. Bradlaugh asserted in the letter in question that this was not so, and that funds subscribed for that object had been diverted from their legitimate source. Lord Salisbury's cheque, as to its object, could not have been a more charitable one. The suggestion was that cheques of the leading Conservatives, including Lord Salisbury, had been used to organize sham meetings. After the evidence, Mr. Bradlaugh entirely withdrew the charges so far as they related to Lord Salisbury. The other cheque traced, viz., Mr. Bates's for £10, was shown to have been used for quite as charitable an object. So both these cheques disappear. But then there was the other cheque of Mr. Norris, M.P., for £5, which Mr. Peters said had been given him towards the association. Where, then, has it been shown that Mr. Peters had had cheques from leading Conservatives, etc., as stated in Mr. Bradlaugh's letter? If, therefore, they were of opinion that Mr. Bradlaugh had failed to establish the truth of his statements, the only other question for them was that of damages. In dealing with it they must look at all the circumstances of the case; and alluding to the fact of Mr. Bradlaugh declining to act upon the suggestion thrown out at the adjournment, and when his case had—so far as Lord Salisbury was concerned—completely fallen to the ground, he reminded the jury that by so acting Mr. Bradlaugh had aggravated his offence. Mr. Bradlaugh had called for Mr. Peters's subscription-book in connection with the Sugar Bounties Association, and he had looked into it, and felt bound in fairness to say that he found therein the names of very eminent men—Conservatives and Liberals—as subscribers. The learned judge then referred to the article published by Mr. Bradlaugh in the *National Reformer* of February 28, 1888, in which Mr. Bradlaugh asserted that he was prepared to prove that Peters had received a large number of cheques from leading Conservatives, all of which had passed through Mr. Peters's hands. How had he proved this, or did his own account of the matter justify him in making such grave charges? The jury, without retiring, and after fifteen minutes' consideration, found a verdict for the plaintiff for £300 damages. Mr. Baron Huddleston gave judgment for the plaintiff for £300, granted a certificate for a special jury, and declined to stay execution.—*English Law Journal.*

DIARY FOR JUNE.

3. Sun.....*1st Sunday after Trinity.*
4. Mon....Lord Eldon born, 1751.
5. Tues ...Maritime Court sits.
9. Sat.....H. C. J. sit. end. L. S. Easter Term ends.
10. Sun.....*2nd Sunday after Trinity.*
11. Mon....York C. C. sit. for motions begin.
12. Tues ...Gen. Sess. and C. C. sit. for trial except in York.
15. Fri. ....Magna Charta signed, 1215.
16. Sat.....York C. C. sit. for motions end.
17. Sun.....*3rd Sunday after Trinity.*
18. Mon....Battle of Waterloo, 1815.
20. Wed....Accession of Queen Victoria, 1837.
22. Fri. ....Longest day. Slavery declared contrary to law of England, 1772.
24. Sun.....*4th Sunday after Trinity.* St. John Baptist.
25. Mon....Sir M. C. Cameron died, 1887.
28. Thur. ..Coronation of Queen Victoria, 1838.
29. Fri. ....St. Peter.

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

THIRD DIVISION COURT, COUNTY OF ELGIN.

BELL TELEPHONE CO. *v.* PENNINGTON.

Distress for rent—Exemptions from seizure—Refusal of bailiff to seize through a mistaken view of the law—Insufficient levy—Second seizure where the first insufficient—Replevin—Detention a good seizure.

Replevin for a telephone which was loaned on hire by the plaintiffs to Cox & Co., brokers, at St. Thomas. Cox absconded, and left the rent of the premises, about $50, unpaid. The defendant, as landlord of Cox & Co., instructed the bailiff to seize the goods on the premises, including the telephone, for the rent due. The bailiff seized and sold goods to the value of $31, but refused to seize the telephone, thinking he had no right to do so. The landlord detained it, claiming a lien on it for the unpaid rent.

Held, (1) that the telephone was liable to seizure, and that the defendant was not prejudiced by the refusal of the bailiff to seize it.

(2) That where, through no fault of the landlord, a sufficient levy cannot be made at first for unpaid rent, he may distrain again.

(3) That, in the circumstances, the detention of the telephone by the landlord was a good seizure.

[HUGHES, Co. J.—St. Thomas, May 30.

The plaintiffs loaned, on hire, one of their operating instruments to Cox & Co., the tenants of the defendant, of certain rooms and premises in the city of St. Thomas, in which Cox & Co. carried on their business. Cox absconded, and the rent due to the defendant was left unpaid, for which he distrained, issuing his warrant to H. Thornton, his bailiff. Upon the distress certain goods were seized. The telephone was then upon the premises, but it was not included in the distress and sold, as it might have been. The defendant's warrant directed the bailiff to distrain the goods which were liable to distress for rent in the demised premises, but made no exemption of the instrument in question in this action. The goods seized under the warrant were not sufficient, when sold, to pay the rent due. The bailiff supposed that it was illegal to seize the instrument, and he told the defendant that he would not seize it, though the defendant urged, and the warrant required, him to do so. The telephone was not included in the inventory or appraisement; but that was owing to the mistaken view of the bailiff that it was not distrainable, and not from any abandonment by the defendant himself. The rent due and unpaid amounted to $50, and only $31 or $32 was realized. The defendant knew that the bailiff had not seized the telephone, but he still claimed the right to distrain, and he held it for the balance of rent remaining unpaid. It was in his possession on the demised premises when the plaintiffs sent for it, and when, in about ten days afterward, it was replevied. The plaintiffs sent to the defendant to demand their instrument, but the latter refused to deliver it up, on the ground, as he said, that he had a lien upon it for the balance due upon the rent distrained for.

The plaintiffs contended (1) that they are entitled to succeed because there is no evidence that the instrument was seized; but, on the contrary, the evidence shows that it was not. (2) That seizure only could justify a detention of goods on the demised premises. (3) That there could be no lien for rent unless the landlord's rights were actively exercised and enforced by seizure. (4) That as against a stranger to the distraint (as the plaintiffs were) the landlord's proceedings must be strictly regular. (5) That the defendant has established nothing beyond an intention to seize, and that the instrument was not liable to seizure at the time the warrant was issued. *Williams* v. *Grey*, 23 U. C. C. P. 568, was cited in support of the plaintiffs' contention.

HUGHES, Co. J.—The Statute 17 Car. II. c. 7, s. 4, provides that "in all cases where the value of the chattels distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears."

It is laid down that there is nothing more clear than that a person cannot distrain twice for the same rent, for, if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for adopting such a course.

It is also laid down, with as much certainty, that if a man seize for the whole sum that is due to him, and only mistake the value of the goods seized, which may be of uncertain or imaginary value—as pictures, jewels, racehorses, etc.—there is no reason why he should not afterwards complete his execution by making a further seizure. See *Hutchins* v. *Chambers*, 1 Burr. 579; 1 Wm. Saund. 201, n. 1.

In this case there was no hardship or oppression in what was done by the landlord—the tenants were the only ones who could complain of that, if there had been any such, and they had absconded. I do not see that the landlord in any sense split up the entire sum due to him, and distrained for part at one time and for the other part at another time. That would have been oppressive. On the contrary, he evidently acted (and, I think, properly so) under the supposition that all the goods in the demised premises, including the telephone, were liable to seizure as and for the distress for rent, and it was the mistaken view of the law by the bailiff who made the distress, that the telephone of the plaintiffs was not seized and sold with the other chattels. The defendant ordered him to carry out the warrant of distress and seize the telephone, and the bailiff refused, supposing that it was not restrainable, or that it was exempt from such a seizure. As I have already said, there was nothing oppressive in the acts of either the landlord or his bailiff. The first was insisting upon his full rights and nothing more, and, only for the bailiff's mistaken view of the law, the intrument would have been sold with the other chattels, but there it remained. It cannot be very well urged that because of this mistake, or because there was no actual formal seizure made in the first instance, that therefore the detention of the instrument by the defendant afterwards was illegal.

I think the defendant had a right to detain the instrument under the circumstances. I think he *bona fide* detained it for the balance of rent in arrear, as he had a right to do. *Cramer* v. *Mott*, L. R. 5 Q. B. 357, is in point; *Wood* v. *Nunn* is a leading case on this point, 5 Bing. 10. In that case the defendant, a landlord, to whom rent was in arrear, hearing that a machine was about to be removed, entered on the premises, and, laying his hand on it, said, in the presence of the tenant and the plaintiff, who claimed property in the machine, "I will not suffer this or any of the things to go off the premises till my rent is paid." The plaintiff, however, carried the machine off, and the defendant afterwards seized it. It was held that there was a sufficient distress to entitle the defendant to the article in question, and several other cases, marked and cited in *Cramer* v. *Mott*, show that a mere detention is a sufficient distress.

Had the defendant here first made a distress, and then abandoned his seizure and distrained again, his case under the authorities would have been different, and would have precluded his justifiably detaining the instrument which is the subject of this replevin.

The case *Williams* v. *Grey*, cited in argument, was altogether different in its facts and circumstances from the present. In that case the landlord had purchased a piano at the sale of his tenant's goods, on a distress by himself, for rent in arrear. It was held, in an action by a stranger, for the recovery of the piano, which belonged to him, and which the landlord had himself purchased, that the property never could vest and had not vested in the landlord by such a sale; and that he could not resist the claim of the stranger to the goods on the ground or pretence that he still had a lien for the rent. The court held that it seemed "impossible to consider the piano as remaining forever in his hands, as a pledge, or as being in any way in the custody of the law." In that case, too, the impounding was over, the piano had been removed to the landlord's (the defendant's) own house, and the distress was in every way at an end, which was not the case here.

The case of *Bagge*, appellant, v. *Mawley*, respondent, was not like the present (see 8 Ex. 641), because there the landlord after making a distress, although he had the right and opportunity to distrain, abandoned it and distrained a second time for the same rent. It was held that, as he had abandoned the first distress, without any sufficient excuse for so doing, the second distress was illegal.

In this case, although sufficient money was not made by the sale of the goods appraised and inserted in the schedule to pay the rent, the goods seized were never abandoned ; on the contrary, the defendant held on to this instrument, insisting upon his right to hold it as and for a distress.

The principle upon which, as a general rule, a landlord cannot distrain twice, was not invaded in this case; there was no vexing of his tenant by the exercise upon two occasions of this summary remedy. It cannot be said that the distress was abandoned by the refusal of the bailiff to sell the instrument replevied, because the defendant held to it that he had a right to seize and sell that, with the other goods distrained. If he had concurred in the apprehension of the bailiff that the instrument could not be seized, and given it up to the plaintiffs, or some one else who claimed it, or handed it over to some creditor of Cox & Co. or their assignees, the case would have been different, and he could have had no right to distrain again.

It was held in *Quinn* v. *Wallace*, 6 Wharton 452, that the levy of one distress is a bar to another, unless the first prove insufficient, without the fault of the landlord.

In *Wallace* v. *Savill*, Lutw. 1536, it was held that the folly of the landlord in not performing an entire duty and fully exercising his right of distress, precluded him from distraining for part of his rent at one time and for other part at another time ; and so *toties quoties*, for several times, for that would be great oppression ; that it was his duty to take a sufficient distress in the first instance, if property sufficient for that purpose was to be found on the premises; so that he should not come a second time to disturb the tenant in his possession.

This case was unlike any of the cases suggested, for although there were sufficient goods to seize that were seized to pay the rent, yet those actually seized, appraised and sold were not sufficient, and the defendant, under the seizure, had a right to have a second appraisement and to sell what remained unsold. There was no oppression, no irregularity, no harshness ; there was no disposition to sell the instrument, but the rent was not paid. The value of the goods set forth and described in the inventory, which belonged to Cox & Company, was not sufficient to pay the rent. The bailiff was mistaken in the view he took of the law, and the defendant did what I think and hold he was justified in doing. He was not bound by the legal opinion of his bailiff as to his rights as a landlord, and I think, and hold, that the defendant properly refused to let the instrument replevied go, until the balance of rent should be paid, which, under the authorities cited, amounted to a legal seizure.

I therefore order judgment to be entered for the defendant, with a return of the goods replevied, or payment of the balance of rent due the defendant, with costs of distress and of this suit.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [May 21.

REGINA *v.* AMBROSE AND WINSLOW.

Canada Temperance Act—Conviction—Jurisdiction of police magistrate—Place where offence committed—Question of fact—Statute not proved to be in force—Certiorari—Want of jurisdiction to be shown affirmatively—Joint conviction—Imprisonment of one defendant for default of the other—R. S. C. c. 178, *ss.* 87-88.

The defendants were convicted by the police magistrate of the town of Peterborough of selling intoxicating liquor in that town, con-

trary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction,

Held, that the question where the sale took place was one of fact, and the magistrate having found, as shown by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the court could not review his decision.

Held, also, that the defendants were not entitled to a *certiorari* to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the *certiorari* they did not show affirmatively that the Act was not in force there. But

Held, that the conviction was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants having paid his half of the fine and costs might be imprisoned for the other's default; and this defect was not cured by ss. 87 and 88 of the Summary Convictions Act, R. S. C. c. 178.

W. R. Riddell, for defendants.

Watson, for magistrate.

Delamere, for complainant.

Divisional Court.] [May 23.

BRADY *v.* SADLER.

Crown patent—Construction of—Reservation of drowned lands—Use of bracket boards on mill-dam—Prescription—Evidence.

A crown patent, issued in 1852, conveyed to the plaintiff, B., a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats and persons." The lot actually contained 200 acres, but the dry part was only sixty acres. Before the issue of the patent there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot.

The two judges composing the Divisional Court agreed in reversing the judgment of PROUDFOOT, J., 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiff's lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was

Held, *per* ARMOUR, C.J., that the words in the grant "containing by admeasurement sixty acres, be the same more or less" did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and, therefore, that B. took under the patent not only the dry part of lot 9, but also the drowned land excluding the channel of the river, and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam.

Per STREET, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and, therefore, the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards.

Remarks upon the admission of extrinsic evidence to aid in the construction of a Crown patent.

Moss, Q.C., and *H. O'Leary*, for the plaintiff.

S. H. Blake, Q.C., and *T. Stewart*, for the defendant.

Divisional Court.] [May 25.

BANK OF HAMILTON *v.* TAMBLYN.

Chattel mortgage—Informality cured by taking possession—Insolvency of mortgagor—Prior seizure by mortgagees under execution—Preference—48 Vict. c. 26, s. 2.

A chattel mortgage made by D. to McL was given to secure a sum made up of debts due to McL. and two other persons; McL. made the usual affidavit of *bona fides*, asserting that the whole sum was due to him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D., and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession.

Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession nor the fact of the seizure under execution before taking possession affected the position of the plaintiffs.

Held, also, that the taking possession could not be viewed as a preference within 48 Vict. c. 26, s. 2.

I. J. Scott, for the plaintiffs.

H. J. Scott, Q.C., for the defendants.

Full Court.] [May 28.

REGINA *v.* ABBOTT.

Canada Temperance Act—R. S. C. c. 106, ss. 2 and 103b—Police magistrate for one of a union of counties—Jurisdiction.

Having regard to the provisions of s. 103*b* of the Canada Temperance Act, R. S. C. c. 106, as interpreted by s. 2, an union of counties united for municipal purposes cannot be said to have a police magistrate by reason of one of the counties so united having one; and a conviction by one commissioned as police magistrate for the county of Dundas for an offence against the Act, committed in the county of Dundas, one of the united counties of Stormont, Dundas and Glengary, was quashed for want of jurisdiction.

A. H. Marsh, for the defendant.

Delamere, for the complainant.

Full Court.] [May 28.

REGINA *v.* ROE.

Canada Temperance Act—Police magistrate, jurisdiction of—County and town—R. S. C. c. 106, s. 103b—R. S. O. (1887) c. 72, s. 11—Information and summons—Irregularity.

A person commissioned as police magistrate for the county of Huron, his commission not excluding the town of Wingham, and having also a separate commission as police magistrate for the towns of Clinton, Goderich, Wingham and Seaforth respectively, all being in the county of Huron, convicted the defendant at Wingham of an offence against the Canada Temperance Act, committed at Wingham, but upon an information taken and summons issued at Clinton.

Held, having regard to the provisions of s. 103*b* of the Canada Temperance, R. S. C. c. 106, and of R. S. O. (1887) c. 72, s. 11, that the magistrate had jurisdiction in the town of Wingham under his commission for the county, and had also jurisdiction under that commission to take the information and issue the summons at Clinton; and the fact that he described himself in the information and summons as police magistrate for the town of Wingham did not deprive him of the jurisdiction which he had as police magistrate for the county.

Regina v. *Young*, 13 O. R. 198, overruled.

Quære, whether the defendants could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty.

Aylesworth, for the defendant.

Delamere, for the complainant.

Full Court.] [May 30.

REGINA *v.* BACHELOR.

Canada Temperance Act—Conviction—Information laid after defendant has left jurisdiction of magistrate—R. S. C. c. 178, *s.* 13, *construction of.*

The words "being within the jurisdiction of such justice" in s. 13 of the Summary Convictions Act, R. S. C. c. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the information was laid; and an order *nisi* to quash a conviction for an offence against the second part of the Canada Temperance Act on the ground that, the defendant not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information nor to summon the defendant from without his jurisdiction, was discharged with costs.

Mackenzie, Q.C., for the defendant.

Delamere, for the complainant.

Common Pleas Division.

SHEARD *et al. v.* LAIRD.

Undue influence — Deed procured through threats, etc.—Setting aside.

The defendant, a merchant and active business man, had endorsed a note for G. Subsequently G. made an assignment for the benefit of his creditors, and on defendant requiring security, G.'s wife gave defendant her note for the amount. She held some property which had been purchased by her husband and conveyed to her, which was to be sold and the note paid. G. sold the land, but instead of paying the note, absconded, leaving his wife. The defendant then went to Mrs. G., and by the use of abusive language and threats of criminal prosecution against her husband, and of exposure of herself and him in the papers, she being of delicate constitution, frightened her into procuring her mother (a very old woman in feeble health), influenced by the communication of the threats to her, to get the deed from her solicitor of a small property she owned—defendant giving strict injunctions not to inform the solicitor of the object, lest he should dissuade her—and to execute a deed to defendant, conveying the property absolutely to him, in payment of the debt, merely giving her back an informal memorandum evidencing her right to obtain a reconveyance on payment of the debt. At the same time he procured Mrs. G. also to execute the deed, which contained a clause barring dower she had in the land, and which was absolute and unconditional, and without any right to her to redeem. The deed was executed in the office of the defendants' conveyancer, without any one being present to advise plaintiffs.

Held (reversing the judgment of ARMOUR, J., at the trial), that the deed could not be supported as against the mother and must be set aside; and also, under the circumstances, as against Mrs G.

REGINA *v.* HAGERMAN.

Criminal law—Forgery—Witness interested—Corroboration—R. S. C. c. 174, *s.* 218—*Partnership.*

By sec. 218 of R. S. C. c. 174, "The evidence of any person interested, or supposed to be interested, in respect of any deed, writing, or instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting Forgery,' shall not be sufficient to sustain a conviction for any of the said offences, unless the same is corroborated by other legal evidence in support of such prosecution."

The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co. on the Quebec Bank, which he had altered from $400 to $1,400. The evidence in support of the forgery was that of J., who though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability, and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.'s withdrawal.

Held (ROSE, J., dissenting), that J. was not a person interested, or supposed to be interested, within the meaning of the Act, and his evidence did not require corroboration.

O'SULLIVAN *v.* LAKE *et al.*

Valuator—Liability of—Misdirection.

The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged, and was paid, a fee.

The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood, was evidence of negligence.

Held (GALT, C.J., dissenting), this was misdirection.

It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the enquiry: "Why was not the original transaction carried out?"

Held (per ROSE and MACMAHON, JJ.), that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts.

K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from $200 to $300 per acre, but the judge told the jury that K. was not in the land business, and had no knowledge of the value of the property.

Per ROSE, J.—The observations as to K. were a practical withdrawal of his evidence from the jury.

Per GALT, C.J. — There was evidence of negligence to go to the jury, particularly in defendant L. not making enquiries of others in the neighbourhood as to the value of the land.

A new trial was therefore directed.

Chancery Division.

Boyd, C.] [April 26.

IN THE MATTER OF THE WINDING-UP ACT R. S. C. C. 129, AND THE CENTRAL BANK OF CANADA AND YORKE.

Winding-up Act, R. S. C. c. 129—Deposit receipt—Promissory note—Contributory—Set-off.

Y., in making a deposit on a government contract, gave a marked cheque on the Central Bank, which cheque was subsequently cancelled and a deposit receipt substituted therefor. The bank obtained Y.'s note for the amount as a voucher for, or to cover, the amount of the deposit receipt. The bank went into liquidation on December 3, 1887; and on January 20, 1888, Y., having been compelled by the Government to take up the deposit receipt and replace it with other security, took an assignment of it, and notified the bank.

On being threatened with a suit on the note, Y. filed a petition asking for leave to set up the deposit receipt against the note as a set-off.

Held, following *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265, that the maker of a note to the bank was a mere debtor and not a contributory, and that a debtor who is also a shareholder, and so a contributory, is not a contributory *quoad* the debt which arises out of an independent transaction, and for that reason, s. 73 of R. S. C. c. 129 does not apply to this case.

Held also, that the prohibition against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is applicable as if the bank was a going concern, and following *Re the Moseley, etc., Coke Co., Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually arose, not by rea-

son of dealings subsequent to the Winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the Government; and in taking up the deposit receipt and supplying better security he was only fulfilling that which he was obliged to do by a prior *bona fide* engagement.

Snelling, for the petitioner.

Foster, Q.C., for the liquidators.

Boyd, C.] [April 9.

KIRK *et al. v.* BURGESS *et al.*

Execution debtor—Lands on hand—Rents collected and applied to other purposes than payment of the plaintiff's judgment—Appointment of receiver to collect—Creditors' Relief Act, R. S. O. c. 65.

The defendant was a judgment debtor, and had no goods and chattels, but was the owner of several houses subject to mortgages, and his agent was collecting the rents and applying the surplus thereof, after payment of the annual charges on the houses, to the defendant's use for other purposes than the payment of the plaintiff's judgment. In an application by the plaintiff for the appointment of a receiver to collect the rents, it was

Held, that a receiver should be appointed, but as the land was encumbered, such appointment should be without prejudice to the rights of the mortgagees, and following in *re Pope* 17 Q. B. D. 749, that although the ordinary remedies by way of execution are open, the court has power to award equitable execution in any and every case, when it is just or convenient so to do; and if the court sees that any good end will be served by appointing a receiver, it will so order.

Held also, that as the judgment debtor had appointed an agent who was collecting the rents and paying certain creditors, it was more equitable to have a receiver as an officer of the court collect and apply them for the benefit of the plaintiffs and other creditors entitled under the Creditors' Relief Act, R. S. O. c. 65.

H. Cassels, for the petitioner.

Tilt, Q.C., contra.

Boyd, C.] [May 9.

Re CROSKERY.

Dower — Bar in mortgage — Equity of redemption—Surplus after sale.

The owner of land in fee mortgaged it to a Building Society in fee. After this, he assigned his equity of redemption to the sheriff of the county of Huron, together with all his estate, for the benefit of his creditors. After the assignment, the mortgagees sold under the power of sale, and after payment off of their claim a surplus of $387.48 was left, which they sought to pay into court under the Trustees' Relief Act.

Held, on appeal from the Master in Chambers, that the claim of the wife of the mortgagor in respect to dower was of such a character that the mortgagees ought not to be put to the risk of determining whether it was, or was not, well founded, and were, therefore, entitled to pay the money into court.

Smart v. *Sorrenson*, 9 O. R. 640, and *Calvert* v. *Black*, 9 P. R. 255, commented on.

Wm. Douglas, for the mortgagees.

Hoyles, for the assignee for the benefit of creditors.

Practice.

C. P. Divisional Court.] [May 26.

In re MCLEOD *v.* EMIGH.

Costs—Motion for Prohibition.

By R. S. O. (1887), c. 52, s. 2, a successful party on an application for a writ of prohibition, is entitled to costs, and should be awarded costs, unless the court in the proper exercise of a wise discretion can see good cause for depriving such party of costs; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation. Under the circumstances of this case, reported 12, P. R. 450; the defendant was allowed costs of a successful motion for prohibition to a Division Court.

Aylesworth, for the motion.

A. M. Grier, contra.

Street, J.] [May 28.

VILLENEUVE *v.* WAIT.

Writ of summons — Special indorsement — Judgment under Rule 80.

The writ of summons was indorsed as follows: "The plaintiff's claim is for $213.90 balance due for sawing wood by the plaintiff for the defendant."

Held, not a sufficient special indorsement to admit of the plaintiff moving for judgment under Rule 80.

H. Symons, for the plaintiff.

Aylesworth, for the defendant.

Court of Appeal.] [May 29.

MORTON *v.* MCCABE.

County courts—Term motion—Time for making—R. S. O. (1887), *c.* 47, *ss.* 29, 41—*Rule* 488.

Reading s. 41 with s. 29 of the County Courts Act, R. S. O. (1887), c. 47, and having regard to the provisions of Rule 488, it cannot be held that a party is restrained by s. 41 to move in term time, *i.e.*, during the first two days of the next quarterly sittings of the County Court, against the verdict or judgment at the trial; s. 41 limits a time after which a party has no right to move; but he may by force of s. 29 move before the judge in court, if the judge chooses to hear him, at any time after judgment has been given, and not necessarily at one of the usual fixed sittings of the court.

Smith v. *Rooney*, 12 U. C. R. 661, is not applicable to the existing law and practice.

C. J. Holman, for the plaintiff.

G. Bell, for the defendant.

Q. B. Divisional Court.] [June 1.

GREEY *v.* SIDDALL.

Venue—Convenience—Cause of action—Leave to appeal—Terms.

The question for decision on an application to change the place of trial is, Where can the action be most conveniently tried? And where, in an action on a promissory note for the contract price of work done by the plaintiff in refitting a mill in the county of Middlesex, to which the defence was that the contract had never been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London, it was

Held, that London was the most convenient place for trial, and the venue was changed accordingly.

Per ARMOUR, C.J.—An action should be tried in the county where the cause of action arose.

Leave to appeal to the Court of Appeal was asked by the plaintiff, because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties to the appeal.

H. D. Gamble, for the plaintiff.

Shepley, for the defendant.

Law Students' Department.

LOAN OF BOOKS TO STUDENTS BY THE LAW SOCIETY.

TO THE EDITOR OF THE LAW JOURNAL:

Dear Sir,—I mark with pleasure the appearance of a letter in your journal subscribed "Lex," touching the very obnoxious requisition enforced by the Law Society, that a student must deposit $10 in order to procure books. Although the Benchers may not have been cognizant of the fact, it is still notorious that students are often put to great inconvenience and trouble to procure the necessary deposit; and, as "Lex" points out, the practice is wholly unnecessary, even though students might, which is unlikely, seek to purloin books when they have the opportunity. The Society has jurisdiction over their actions and could easily enforce the return of such books. The Benchers, on the other hand, protest that they are compelled to take such a course in order to protect themselves; but how fallacious and unfounded this is will be seen when we turn to the Toronto Public Library, as likewise to any public library, and see how, dealing with many

thousands of sometimes very questionable people and strangers, the Board have found by experience that a deposit of five cents, with the security of a ratepayer, affords them sufficient protection against delinquent book-borrowers. The Benchers may say the amount is small, but let them reflect that students are, as a rule, labouring under the rather serious difficulty of being unpaid for their services, and, moreover, many students are provided for by poor parents, mostly residing in the country, who find it a tax of no mean proportions to clothe and board their sons, without having to lock up a sum such as $10 for a useless and unwarranted purpose.

Law students are notable for their sobriety and studious habits, and I think the action of the Benchers in this matter displays a great lack of confidence in a portion of the Law Society, who are one day to become members of the Bar themselves. The result of this law has been that students, burdened on account of circumstances over which they certainly have no control, are forced into the rather unwholesome practice of borrowing.

In conclusion, let me hope that these complaints may come before the proper persons, permit me also to say that the abolition of the rule would be a benefit to the Benchers themselves, for it is well known that great trouble occurs from the students withdrawing their money, which is their right, when necessary, and then depositing it again.

POOR STUDENT.

We now continue the questions asked at the English examination for call to the bar preceding Hilary Term, 1888.

COMMON LAW.

Pass Paper.

Q.—7. X., the owner of a carriage, hires horses of a stable-keeper, who also provides a driver. Through negligence of the driver whilst driving X., a person walking in the road is injured. Can the latter recover in an action for damages against X. ? Within what limits does the maxim *respondeat superior* apply, in cases of negligent driving by a servant?

A.—The injured person cannot recover in an action for damages against X., because the driver is not the servant of X. The stable-keeper, however, is liable, as being the employer of the driver (*Laugher* v. *Pointer*, 5 B. & C. 547 ; *Quarman* v. *Burnett*, 6 M. & W. 499).

The maxim *respondeat superior* applies in cases of negligent driving by a servant, only where the driver is actually the servant of (*i.e.*, appointed as such by) the person under whose orders he is acting at the time when the damage is done ; and where, at that time, he is engaged on his employer's business, and is acting within the scope of his authority.

Q.—8. Can a person wrongfully in possession of land recover in an action for trespass to it? Is it always necessary, in order to maintain an action for trespass on or injury to land or buildings, that the plaintiff should be physically in possession thereof? If not, give your reasons.

A.—A person who is wrongfully in possession of land can recover in an action for trespass to it, if the defendant has, as against the true owner of the land, no right of entry thereon ; because the possession of the land by the plaintiff is sufficient evidence of his title, as against a person who has no better title.

A person who is not in actual possession of land may nevertheless maintain an action for injury thereto, or to buildings thereon, if he has a right of property in the land (*e.g.*, where he is entitled in reversion subject to a lease for a term of years) ; provided the damage done is of such a nature as to prejudicially affect his estate or interest in the property.

Q.—9. What is the liability of an innkeeper for the loss of the property of a guest at an inn (*a*) at common law, (*b*) by statute ? What is the liability at common law of a common carrier, and how is this affected by the Carriers' Act ?

A.—(*a*) At common law, an innkeeper was liable for loss of the property of a guest at the inn, unless the loss was caused by the act of God, or the king's enemies, or by the negligence of the guest himself.

(*b*) By the Innkeepers' Act, 26 & 27 Vict. c. 41, an innkeeper is not liable for such loss (except the property be a horse or other live animal, or its gear, or a carriage) beyond the sum of £30, unless (1) the goods are stolen, lost, or injured through the wilful neglect or default of the innkeeper or his servant ; or (2)

the goods are deposited with him expressly for safe custody, in which case he may demand that they may be placed in a sealed box or other receptacle; or (3) he refuses to receive the goods for safe custody, or by his default the guest is unable so to deposit them; or (4) he has omitted to exhibit in the hall or entrance of the inn a printed copy of that part of the Act which limits his liability as above mentioned.

By the common law, a common carrier was liable for loss or injury to the goods carried by him, arising from any cause except the act of God or the king's enemies, or some defect in the goods carried; unless he limited his liability by a contract made for that purpose with his customer. A notice limiting the carrier's liability, put up in his office, and shown to have come to the customer's knowledge, was formerly held to constitute such a contract; but the Carriers' Act, 11 Geo. IV. and 1 Wm. IV. c. 68, provides that no such notice shall have any effect. The common law liability of carriers was materially altered, however, by the Act last mentioned. Under this Act, a carrier is not liable for loss or damage to certain articles specified in the Act, when the value exceeds £5, unless the value be declared at the time when the goods are delivered to the carrier, and an increased charge, notified in the carrier's office, is accepted by him. The Act, however, does not protect the carrier when he does not properly notify or demand the increased charge; or when the loss of, or damage to, the goods arises from his own misfeasance, or the felonious act of his servant.

Q.—10. Is there any distinction between malice in fact and malice in law? How is a wrong intent, when an essential element in a crime, to be proved? A prisoner is indicted for "setting fire to a mill, with intent to injure the occupier." Is it requisite for the prosecution to give any evidence other than the mere fact of setting fire to it, in order to convict? State your reasons.

A.—Malice in fact means a design or wish to do harm to a person. Malice in law means an intention to do an act which is forbidden by law; and the term is sometimes used in a wider sense, as including culpable negligence resulting in an illegal act or omission.

Where an act done is apparently a criminal offence, the wrongful intention may be inferred; for the law presumes that every man must contemplate the necessary consequences of his own act. But where an act is not apparently a crime, but may be so if done with a wrongful intent, evidence must be given of facts showing such intent, or from which it may be inferred. In the case put in the question, it would not be necessary to give any evidence to prove any fact other than setting fire to the mill; because injury to the occupier of the mill would be a necessary or probable consequence of the act (*R. v. Farrington*, Russ. & Ry. 207; Broom, C. L., Book 4, ch. 1).

Q.—11. Are the directors of a railway company liable for any and what criminal offence, if, owing to the fact of the permanent way being left, through negligence, out of repair, an accident happens causing death? Give your reasons.

A.—If it could be shown that the want of repair was the necessary consequence of the negligence of the directors, they would be guilty of manslaughter; but they would not be subject to any criminal liability if the death were caused through the negligence of workmen or others in the employment of the company.

Q.—12. Describe the proceedings at the trial of a prisoner on an indictment, mentioning any rules of evidence specially applicable in criminal cases.

A.—The proceedings commence with the arraignment of the prisoner. Assuming that on arraignment he pleads not guilty, the petty jury are thereupon sworn (subject to the prisoner's right of challenge), and he is given in charge to them. The counsel for the prosecution then opens his case to the jury, stating the principal facts to be proved, and calls and examines his witnesses, who may be cross-examined by the prisoner's counsel, and re-examined by counsel for the prosecution, on facts referred to in the cross-examination. On the close of the case for the prosecution, if the prisoner has witnesses, his counsel opens his case to the jury, calls and examines his witnesses, who may be cross-examined and re-examined, and then sums up his evidence; and the counsel for the prosecution replies on the whole case. But if no witnesses are called by the prisoner, the counsel for the prosecution addresses the jury for the second time at the

close of the case for the prosecution; after which, the prisoner's counsel addresses the jury. The judge then sums up, and the jury give their verdict, after which (if they find the prisoner guilty) sentence is passed; the prisoner (in cases of treason and felony) being usually asked, before sentence, if he has anything to say why sentence should not be passed on him. If there is any ground for moving in arrest of judgment, the motion must be made after verdict and before sentence is passed (Harris, Cr. L., 3rd ed. 370, 400).

That the following are some of the principal rules of evidence applicable to criminal as distinguished from civil trials: That the prisoner is to be presumed to be innocent till the contrary is proved; that he is not to be convicted on the uncorroborated evidence of an accomplice; that a confession made by him is admissible in evidence, provided it was free and voluntary; that neither the prisoner nor his or her wife or husband can be a witness; that a dying declaration made by a person as to the cause of his death is admissible in evidence on a trial for the murder or manslaughter of such person; that evidence as to the prisoner's character is admissible under certain conditions. (See Harris, Cr. L., 3rd ed. ch. 17.)

Appointments to Office.

CROWN ATTORNEY AND CLERK OF THE PEACE.

Muskoka and Parry Sound.

A. A. Adair, Stratford, for the United Provincial Judicial District of Muskoka and Parry Sound.

DIVISION COURT CLERKS.

Lambton.

Martin Wattson, Thedford, Sixth Division Court, *vice* Thomas Kirkpatrick, resigned.

Bruce.

P. D. McInnes, township of Huron, Ninth Division Court, *vice* James McLeod, who has removed from the locality.

BAILIFF.

Middlesex.

Henry Lockwood, township of Delaware, Fourth Division Court, *vice* James Fitzallan, deceased.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I.. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. JULY 3, 1888. NO. 12.

THE Canadian Institute is making a praiseworthy effort to collect and permanently preserve reliable data respecting the political and social institutions, the customs, ceremonies, beliefs, pursuits, modes of exchange and devolution of property and office which prevail among the Indian tribes of Canada. Knowing that the advance of civilization is yearly diminishing the sources of this information, the Institute seeks to secure the co-operation of every person who has the means of acquiring facts bearing on any of the sociological questions concerning the aborigines of this country. It is hoped that by the active and hearty assistance of those who take an intelligent interest in the Indian tribes, much light may be cast upon the origin and development of government, and upon legal, social and economic progress. The circular issued by the learned society referred to, contains a somewhat elaborate classification of the points on which light is desired, and we refer those interested to that circular for fuller information than our space will admit of.

DR. LAVELL, the Warden of the Kingston Penitentiary, stated in the course of an address a few days ago, that of fifty-eight convicts who have come into his custody since the beginning of the present year, only one is over fifty years of age, while fifteen are between twenty and twenty-five, and thirteen are under twenty. At least two-thirds of the new convicts are under thirty. The Warden questioned the thirteen young criminals as to the causes which led them into crime, and found that they began with disobedience to parents, evil associates and Sabbath breaking. The general prevalence of illiteracy amongst the criminal classes is striking. Two-thirds of these convicts are unable even to read. One of the most ominous signs of our day is the lack of respect which children are allowed to show towards their parents; and the latter, in the face of the foregoing facts, by neglecting to exact proper respect for and deference to themselves and to enforce obedience, are paving the way for disobedience to the laws of the State, and a career of crime on the part of their children. Our schools are the enemies of crime, and every effort should be made to diminish illiteracy. It is to the advantage of the community to educate children when young, rather than to imprison them when they grow up.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for June comprise 20 Q. B. D. pp. 721-839, and 38 Chy. D. pp. 1-237.

PRACTICE—PAYMENT INTO COURT—DEFENCE SETTING UP TENDER—DENIAL OF LIABILITY—PAYMENT OUT OF COURT.

Davys v. *Richardson*, 20 Q. B. D. 722, shows that the English rules respecting the payment of money into court are sufficient to prevent the injustice which under the Ontario Rules, a party paying money into court with a denial of liability, is liable to, as demonstrated by the case of *Bell* v. *Fraser*, 12 App. R. 1; 13 S. C. R. 546.

In the present case, the action was brought for wrongful dismissal, claiming a year's salary. The defendant pleaded that the plaintiff was only entitled to one month's notice, or in the alternative to three months' salary; that before action, the defendant tendered three months' salary, which the plaintiff refused; that the defendant had paid that sum into court, and it was sufficient to satisfy the plaintiff's claim. The plaintiff took the money out of court without an order, but continued the action, and in the result was found only entitled to one month's salary. The present application was by the defendant to compel the plaintiff and his solicitor to refund the two months' salary paid in, over and above what the plaintiff had been found entitled to. Pollock, B., refused to make the order; but the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), held that the defendant was entitled to the order as asked, and that the plaintiff, under the circumstances, was irregular in taking the money out of court without an order. The Consolidated Rules, we believe, will be found to have placed the practice on this point in Ontario, on the same footing as it is in England, as appears by this case.

ECCLESIASTICAL LAW—MANDAMUS.

The Queen v. *The Archbishop of York*, 20 Q. B. D. 740, is a case which the historical student can hardly afford to pass by. The application was for a mandamus to the Archbishop of York, as President of the Convocation of York, to compel him to admit the Rev. Canon Tristram, as a proctor to the Convocation duly elected. The Archbishop appeared in person, and, in a learned and able argument, succeeded in satisfying the court that it had no jurisdiction. The judgment of the court was delivered by Lord Coleridge, and in the concluding paragraph he says:

"What we are asked to do, is to interfere in the internal affairs of an ancient body as old as parliament and as independent, to control the action of its president, and to revise or reverse his decision on a matter relating to the constitution of the body itself. For 700 or 800 years it is conceded that no precedent for such an interference can be found. Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere."

PRACTICE—IRREGULARITY—POWER TO IMPOSE TERMS—WAIVER OF RIGHT OF APPEAL.

Aulaby v. *Prætorius*, 20 Q. B. D. 764, is a decision of the Court of Appeal (Fry and Lopes, L.JJ.), on a point of practice. A judgment had been entered prematurely for default of defence, and an application being made by the defendant to set it aside, and asking that the plaintiff should pay the costs; the Master refused the application, and his order was affirmed by Hawkins, J., but the Divisional Court (Huddleston, B., and Manisty, J.), ordered the judgment to be set aside, if £34 (which the defendant admitted that he owed) were paid into court within four days, and in that case, the costs of the application were made costs in the cause, but they ordered that the appeal should be dismissed with costs, if the money was not so paid into court. On appeal, however, from this order, the Court of Appeal held that the judgment being irregular, the defendant *ex debito justitiæ* was entitled to have the judgment set aside, and the court had in such a case no right to impose terms, except as a condition of giving the defendant his costs of the application. It was contended by the plaintiff that the fact that the defendant asked for costs, was sufficient to enable the court to impose terms; but this was held not to be the case. One other point in the case is also deserving of notice, and that is this: Pending the appeal to the Court of Appeal, the defendant paid into court the £34, and it was claimed that his doing so was a compliance with the order appealed from, and therefore, a waiver of the right of appeal from it. But the Court of Appeal said that the payment was made "under the compulsion of the order and not acceding to it," and therefore was no waiver.

SALE OF GOODS—WARRANTY—SALE OF HORSE—CONDITION FOR RETURN—HORSE DISABLED—IMPLIED CONDITION.

In *Chapman* v. *Withers*, 20 Q. B. D. 824, the plaintiff sued for breach of a warranty on the sale of a horse. The horse had been warranted "quiet to ride," subject to a condition that if the buyer contended the horse did not correspond with the warranty it should be returned on the second day after the sale, for the purpose of trial by an impartial person, whose decision was to be final. The plaintiff removed the horse, and while being ridden it ran away, fell, and broke its shoulder. The plaintiff immediately notified the vendors that the horse did not correspond with the warranty; but that owing to the accident the horse was not in a fit condition to be returned. The horse was ultimately killed. The defendant relied on the non-return of the horse, as a defence to the action, but the Divisional Court (Lord Coleridge, C.J. and Mathew, J.), affirmed the decision of a County Court Judge, that the agreement implied the continued existence of the subject matter of the agreement, and that inasmuch as it was clear on the evidence that the horse was no longer in a condition to be returned for the purpose of trial, the plaintiff was therefore relieved from any obligation to return it.

MARRIAGE SETTLEMENT—RECTIFICATION—AFTER-ACQUIRED PROPERTY—AGENCY OF WIFE'S FATHER.

In the case of *Tucker* v. *Bennett*, 38 Chy. D. 1, the Court of Appeal (Sir J. Hannen, P.P.D., Cotton and Lopes, L.JJ.), reversed the decision of Kekewich, J., 34 Chy. D. 754, noted *ante*, vol. 23, p. 232. The learned judge of first instance directed a marriage settlement to be rectified, on the ground that the settlement had been prepared and its terms settled according to the directions of the lady's father, and without her having any independent advice, and contained provisions for the settlement of her after-acquired property, and no power of appointment had been reserved to her over such after-acquired property in the event of her having no issue, and according to the trusts of the settlement, it would devolve in such an event on the next of kin of the settlor—the father. It was proved that the terms objected to had been the subject of express stipulation by the father at the time the settlement was drawn, and that they had been communicated to the daughter, and that she had left the matter to her father to do what he thought was right. Under these circumstances, the Court of Appeal held that no alteration could be made in the settlement; Hannen, P.P.D., however, dissented on the ground that he thought that the case turned on the question of fact, whether the objectionable provisions had been brought to the attention of the wife, and whether she had assented thereto, and on this point he was not prepared to say the conclusion of Kekewich, J., was wrong. Lopes, L.J., was of opinion that a father living on affectionate terms with his daughter, is "her natural agent" in matters relating to the preparation of her marriage settlement.

COMPANY—WINDING UP—CONTRIBUTORY—DIRECTOR.

In re Wheal Buller Consols, 38 Chy. D. 42, an important point of company law was decided. By the articles of association of a limited company it was provided that the qualification of a director should be the holding of 250 shares at least, that he might act before acquiring his qualification; but that his office should be vacated if he did not acquire it within three months after his election. One Jobling, who had subscribed for ten shares only, was elected a director, he accepted the office, and attended the meetings of directors; but he never applied for, nor had allotted to him any more shares. The Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), held, overruling the Vice-Warden of the Stannaries Court, that Jobling's acceptance of the office of director, and his continuing to act after the time by which the qualification ought to have been acquired, did not amount to a contract on his part, to take the additional shares requisite for his qualification, and that he was liable to be placed on the list of contributories for ten shares only.

CONSENT OF COUNSEL—WITHDRAWAL OF CONSENT—MISTAKE.

The only point for which it is necessary to notice, *In re West Devon Great Consols Mine*, 38 Chy. D. 51, is the decision of the Court of Appeal as to the effect of a consent by counsel not to appeal from an order. The appellants were

contributories of a company being wound up, they appeared by counsel before an inferior tribunal, to oppose certain claims against the company ; this tribunal allowed the claims, and ordered the costs of all parties to be paid out of the assets, whereupon counsel for the appellants then undertook not to appeal. Before the order was passed and entered, they applied to have this undertaking omitted from the order, on the grounds that counsel could not give a consent not to appeal ; and that he could not give such a consent after a decision on the merits ; and that the consent was given by mistake, as the decision of the inferior court had turned on a resolution of the company, which the counsel had not seen, and that if they had known its terms they would not have consented. It turned out, however, that the resolution in question had been read in court on a former day. Under these circumstances, it was held by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), that counsel had authority to consent not to appeal, and that as the counsel for the appellants had had an opportunity to become acquainted with the terms of the resolution, there was no such mistake as to entitle them to withdraw their consent. Cotton, L.J., thus disposes of the question : " Every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his clients shall not appeal. As to the other point, the counsel in fact, says : ' The judge has given a decision adverse to my client, and in consideration of his receiving his costs, I undertake that he shall not appeal against it.' That is a compromise. The undertaking is therefore *prima facie* binding."

MARRIED WOMAN — SEPARATE ESTATE — PROPERTY ACQUIRED SINCE 1882 — MARRIED WOMEN'S PROPERTY ACT, 1882 (45 AND 46 VICT. C. 75), SS. 5, 19—R. S. O. (1887), C. 132, SS. 7, 20).

In *Hancock* v. *Hancock*, 38 Chy. D. 78, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirm a decision of North, J., upon a question arising under the Married Women's Property Act, 1882, from which R. S. O. c. 132 is adapted. By a marriage settlement made in 1870, the husband covenanted with the trustees that he would settle, or concur with the wife in settling any property which during the coverture should come to her or to him, in her right ; but the settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, the wife on the death of her mother, became entitled to a share of her mother's personalty, which was not limited to the separate use of the wife. The question was, whether the property thus acquired was subject to the covenant in the settlement, and it was held that it was. Cotton, L.J., on p. 89, observes : " The covenant in the settlement was undoubtedly the covenant of the husband only ; and independently of the *Married Women's Property Act*, it would bind all property coming to the wife during the coverture, and not settled to her separate use. Then we come to sec. 5 of the *Married Women's Property Act*, 1882 (*R. S. O. c.* 132, *s.* 7); and this property is undoubtedly property to which the title accrued after the commencement of the Act. It is contended that the effect of sec. 5, is to give this property to the wife for her separate use, and consequently it is not property which the husband could settle.

If it had been left to her for her separate use, it is admitted that it would not have been within the covenant; does the Act have the effect of making it property to her separate use, so as to prevent it from coming within the covenant? If sec. 5 had been the only section . . . the covenant of the husband could not have touched the property; . . . but then we have sec. 19 (*R. S. O. c.* 132, *s.* 20), . . and we cannot help saying that it excepts from the Act everything which would interfere with the settlement, and would prevent the covenants contained in it from operating. The 5th section does interfere with the settlement. But for that section, the settlement would have given the property to the trustees to be settled for the wife and children, and to say that in the exclusion of this property from the settlement, it does not interfere with the settlement, is not a construction that can be seriously entertained."

JOINT STOCK COMPANY—COMPANIES ACT, 1863, S. 28 (R. S. C. C. 119, S. 44)—INSPECTION OF REGISTERS OF COMPANY—COPIES—ACTION BY SHAREHOLDER IN INTEREST OF A RIVAL COMPANY.

In *Mutter* v. *Eastern and Midland Railway Company*, 38 Chy. D. 92, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirmed a decision of Chitty, J. The action was for an injunction by a shareholder of the defendant company to restrain the company from preventing the plaintiff from taking a copy of the entries in the company's register. The plaintiff was in the service of a rival company, and the stock he held in the defendant company had been given him by the chairman of the rival company to qualify him to attend the meetings of shareholders. The defendant company were willing to permit the plaintiff to inspect the register; but refused to permit him to take copies of the entries. Chitty, J., held that the fact that the plaintiff was seeking to serve the interests of a rival company, did not disentitle him to obtain the assistance of the court in enforcing his statutory right, and be granted an injunction, and the Court of Appeal held he was right.

AGREEMENT TO ENTER INTO AGREEMENT WITH THIRD PARTY—DAMAGES.

In *Foster* v. *Wheeler*, 38 Chy. D. 130, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirms a decision of Kekewich, J., 36 Chy. D. 695, noted *ante*, p. 73. Foster, the plaintiff, was lessee of a house, the lease for which was about to expire, and entered into an agreement with the defendant whereby she agreed within seven days thereafter to enter into a binding agreement with the plaintiff's lessor, for a lease of the premises, and upon such lease being granted the plaintiff agreed to surrender his term. The defendant having refused to carry out the agreement, this action was brought by the plaintiff for specific performance, or in the alternative for damages. Kekewich, J., gave judgment for damages, to be ascertained by reference. From this judgment the defendant appealed, contending that the agreement was invalid for want of consideration, but the Court of Appeal held that the plaintiff's agreement to surrender his term was a sufficient consideration.

PRACTICE—PARTICULARS—DISCOVERY.

In *Millar* v. *Harper*, 38 Chy. D. 110, a point of practice of some moment was determined by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirming North, J., in which the rule is laid down, that where a defendant has means of knowing the facts in dispute, and the plaintiff has not, particulars of demand will not be ordered to be delivered by the plaintiff until after the defendant has given discovery. In this case, the plaintiff, as executor of a deceased married woman, sued her husband claiming that certain chattels in the defendant's possession were the separate property of his deceased wife. The husband applied for particulars showing the chattels claimed; but it was ordered that the application should stand over until the defendant had made an affidavit which of the articles belonged to the wife.

BILL OF SALE—MORTGAGE OF MILL PROPERTY—TRADE FIXTURES.

In re Yates, Batcheldor v. *Yates*, 38 Chy. D. 112, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) held, affirming the decision of the Vice-Chancellor of the County Palatine, that where a mortgage was made of a mill property on which there was fixed machinery, being trade fixtures, which passed to the mortgagee as being affixed to the freehold, and the mortgage contained a power of sale; that the mortgage was not an assignment of the trade machinery so as to require registration under the *Bills of Sale Act*, but was a valid mortgage both as to the land and machinery, and that the power of sale did not authorize the mortgagee to sell the machinery apart from the land.

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Licensed Victuallers' Newspaper Co. v. *Bingham*, 38 Chy. D. 139, was an action brought to restrain the defendants from publishing a newspaper with the same name as the plaintiff's paper. The plaintiffs, on the 3rd February, 1888, commenced the publication of their paper, and registered it at *Stationers' Hall* the next day. No advertisement had been issued that a newspaper under that name was about to be published. On the 6th February the defendants published the first number of a newspaper with the same name. Very few copies of the plaintiff's paper had then been sold. The Court of Appeal (Cotton, Bowen and Lindley, L.JJ.) affirmed North, J., in holding that the registration of the plaintiff's newspaper at *Stationers' Hall* gave the plaintiffs no exclusive right to the name, and that a title to it by use and reputation could not be acquired by a publication for three days with a very small sale.

PRACTICE—THIRD PARTY PROCEDURE—RULES S. C. ORD 16, R. 53 (ONT. C. R. 232).

Barton v. *London & N. W. Ry. Co.*, 38 Chy. D. 144, was an action brought against the defendant company to compel them to re-transfer stock alleged to have been transferred out of the plaintiff's name by means of forged transfer deeds. The transferees were not made parties, but the company served them with third party notices, claiming indemnity. The company, in their defence,

set up all the grounds of defence that could be relied on against the plaintiff's claim. Some of the third parties desired to defend, and Kay, J., gave them leave to attend the trial and take such part as the judge should direct. Two of them appealed from this order, asking for leave to deliver a defence, appear at the trial, put in evidence, and cross-examine the plaintiff's witnesses. The Court of Appeal, however, dismissed the appeal, holding that the third parties would not, according to the old practice, have been necessary parties, and as the defendant company were *bona fide* defending the suit and raising all proper defences, the plaintiffs ought not to be embarrassed and put to expense by unnecessarily allowing persons who were not necessary parties to the action, to take all the same steps as if they had been made defendants.

COMPANY—CONTRACT ON BEHALF OF INTENDED COMPANY—RATIFICATION—POWER OF DIRECTORS—MORTGAGE OF UNPAID CAPITAL—UNAUTHORIZED ISSUE OF DEBENTURES.

Three points of some interest were decided by Kay, J., in *Howard* v. *Patent Ivory Co.*, 38 Chy. D. 156. A contract was made by one Jordan with one Wyber, who purported to act on behalf of an intended company, to sell certain property to the company, part of the purchase money being payable in cash and the balance in paid-up shares. The company was formed shortly afterwards, and the memorandum of association provided for the adoption of the agreement with Jordan. At meetings of directors subsequently held, at which Jordan, who was a director, was present, resolutions were passed adopting the agreement, and accepting an offer by Jordan to accept part of the purchase money in debentures instead of cash, and directing the seal of the company to be affixed to an assignment of leaseholds to be made by Jordan to the company, and to the debentures to be issued to him to the amount of £3,500; the debentures were accordingly issued to him, and the amount secured thereby was made a charge on the capital not called up, and the company took possession of the leaseholds. The company was subsequently wound up, and the liquidator took from Jordan an assignment of the rest of the property comprised in the agreement. It was held, first, that there was sufficient evidence of a contract by the company with Jordan to the effect of the previous agreement, as subsequently modified by the acceptance of debentures instead of cash, and that there was, therefore, at the time the debentures issued an existing debt due by the company; and secondly, that the directors being authorized to mortgage all or any part of the company's "properties and rights," they had power to mortgage the capital of the company for the time being not called up. But, thirdly, that their power of mortgaging being limited to £1,000 in all, the debentures issued for the £2,500 in excess of that sum were invalid.

COMPANY—AGREEMENT TO PAY INTEREST ON SUMS ADVANCED BY SHAREHOLDERS OVER AND ABOVE CALLS—SURPLUS ASSETS.

This number of the reports is somewhat rich in cases on company law. *In re Exchange Drapery Co.*, 38 Chy. D. 171, is another decision of Kay, J., on this

branch of law. A company which was being wound up had, by its articles of association, agreed that a shareholder advancing in respect of any of his shares beyond the amount actually called up, should receive interest on such advances. The company had ratified an agreement between the vendors and promoters, whereby it was agreed that the latter should be paid partly in paid-up shares, and that the holders of vendors' shares should be entitled to dividends upon so much thereof as should equal the amount for the time being paid up on the ordinary shares, and interest upon such amount of the nominal value of the vendors' shares as should equal the amount not called up on the ordinary shares. There being a surplus of assets after paying the debts of the company, it was held that the holders of vendors' shares were entitled to have paid to them on account of their shares such portion thereof as equalled the amount not paid up on the ordinary shares with interest until repayment, and not merely up to the commencement of the liquidation proceedings, such sum being treated as an advance to the company at interest.

WILL—ABSOLUTE GIFT—RESTRAINT ON ALIENATION—CONDITION.

In re Dugdale, Dugdale v. *Dugdale*, 38 Chy. D. 176, is an interesting decision of Kay, J., on the construction of a will, whereby the testatrix gave certain real and personal estate "upon trust for my third son, J., his heirs and assigns; but if my said son should do, execute, commit, or suffer any act, deed or thing whatsoever, whereby, or by reason or in consequence whereof, or if by operation of law, he would be deprived of the beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine and the estates and premises hereinbefore limited in trust for him" were to go and be held in trust for his wife, or in case he had no wife living, then for his children equally. J. survived his mother and was a bachelor, and the present action was brought by him against the testatrix's other children or their representatives, and the trustees of the will, for a declaration that he was absolutely entitled to the property devised, upon the ground that the executory devise over was repugnant and void, and it was held by Kay, J., that the executory gift over was void.

WILL—CONSTRUCTION—VESTED INTEREST—GIFT OVER ON DEATH WITHOUT "LEAVING" ANY CHILD OR CHILDEEN SURVIVING—TESTATOR, WHETHER IN LOCO PARENTIS.

In re Hamlet, Stephen v. *Cunningham*, 38 Chy. D. 183, it was held by Kay, J., that though the artificial rules of construction adopted in *Emperor* v. *Rolfe*, 8 D. M. & G. 391, and subsequent cases in reference to settlements in order to overcome express words of defeasance, of an interest which by previous words of gift are vested in a child, may also apply to portions given by a will where the testator stands *in loco parentis* to the devisee; yet where the gift by will is not one of portions to children, or persons to whom the testator was *in loco parentis*, the words of the will must be construed according to their grammatical meaning; and the mere circumstance that a testator in a clause providing for the maintenance of future children of his only daughter, who was then unmarried,

speaks of shares previously given to such children as "portions," is not sufficient to show that he has placed himself *in loco parentis* to such children. In this case the testator gave personal estate and proceeds of real estate to trustees upon trust for his daughter and only child for life, and after her death for her children, who being sons should attain 21, or being daughters should attain that age or marry, with a gift over if his daughter "should happen to die without leaving any child or children her surviving, or having such, they shall all die without having obtained a vested interest in the said trust, and without leaving any issue him or her surviving." The daughter had five children, all of whom died unmarried in her lifetime, and only two of them attained 21. On the death of the daughter, it was held by Kay, J., that the gift over took effect.

PRACTICE—RECEIVER—MORTGAGE ACTION.

In *Wills* v. *Luff*, 38 Chy. D. 197, which was an action for foreclosure by a subsequent equitable mortgage by deposit, and in which a final order had been obtained, but in which the conveyance of the property to the plaintiff remained to be settled, the plaintiff applied for the appointment of a receiver, and Chitty, J., held that after the final order of foreclosure the action was practically at an end, and the appointment could not therefore be made, because all the defendant's interest was vested in the plaintiff.

WILL—CONSTRUCTION—APPOINTMENT—REMOTENESS—SEVERABLE PROVISO—INFANT—SETTLEMENT.

In *Cooke* v. *Cooke*, 38 Chy. D. 202, there were two points for decision. The first was as to the construction of the will of Isaac A. Cooke. By his marriage settlement the testator was empowered by deed or will to appoint the settled property among his children. By his will he appointed the property among his three daughters equally, with a proviso that if at the time of his death any of them should be unmarried her share should be held in trust for her for life, and after her decease, in case she should die without leaving issue, as she should appoint, and in default of appointment, or in case she should not have issue, on corresponding trusts in favor of his other children. One of his daughters (the plaintiff) was unmarried at the testator's death; and it was held by North, J., that as the effect of the proviso would be to tie up the shares longer than the rules against perpetuity allow, that, therefore, the proviso was void, and that the plaintiff took her share absolutely. The other point in the case related to the real estate affected by the appointment, and it was this: The settlement in question was made in 1834, the wife being then an infant; it, however, contained a covenant by the father and mother of the intended wife, that on the latter coming of age she would convey her real estate to the trustees to the uses of the settlement. The plaintiff was born in 1835, and her mother became of age in 1836, and then executed a conveyance in accordance with the covenant in the settlement. If the power of appointment contained in the settlement dated from 1834, before the plaintiff's birth, then the appointment executed by the testator.

so far as it affected the realty, would be void as offending against the rules against perpetuities: but if it dated from 1836, when the deed of confirmation was executed, and after the plaintiff was born, then the appointment as to the realty would be good. North, J., held that the settlement of 1834 was not void, but merely voidable, and the subsequent deed of 1836 amounted merely to a confirmation, and that therefore the power was conferred in 1834, and the appointment was consequently bad as regards the realty also.

WILL—CONSTRUCTION—CHARITABLE LEGACY—PERPETUITY.

In re Randell, Randell v. *Dixon*, 38 Chy. D. 213, North, J., decided that where a testatrix bequeathed £14,000 on trust to pay the income to the income of a specified church so long as he permitted the sittings to be occupied free; and in case payment for sittings was ever demanded, that the £14,000 should fall into her residuary estate, the bequest was for a specific charitable purpose, and not for charitable purposes generally, and on failure of the trust for the benefit of the incumbent the fund could not be applied *cy-près*, but that it would become part of the testatrix's residuary estate, which being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities.

ENGLISH DOMICIL—MARRIAGE ACCORDING TO CUSTOM OF FOREIGN COUNTRY WHERE POLYGAMY ALLOWED.

The only remaining case to be noted is *In re Bethell, Bethell* v. *Hildyard*, 38 Chy. D. 220, in which the validity of the marriage of a domiciled Englishman with an African woman according to the customs of the Barralong tribe, to which she belonged, and which permitted polygamy, came in question. It appeared that the marriage in question was performed in Bechuanaland, according to the custom of the woman's tribe, and that the man had refused to be married in church, and had never communicated the alleged marriage to his friends in England, and had spoken of the woman as "that girl of mine." They, however, lived together as man and wife, and had issue one child. It was held by Stirling, J., that the marriage was not a marriage in the Christian sense as being "the voluntary union for life of one man and one woman, to the exclusion of all others," but was a marriage in the Barralong sense, which permitted polygamy, and that it was, therefore, not a valid marriage according to the law of England.

CONTINGENT AND EXORBITANT FEES.

I DO not propose to discuss the law of champerty, but would say some things from the ethical standpoint upon the practice of bargaining for large fees, generally, contingent upon the result of the suit, of taking in advance an assignment of a large proportion of the amount expected to be recovered, to be paid for by prosecuting the action as the attorney of him who is supposed to have suffered a wrong.

The practice of bargaining for such fees is very common, so common as hardly to excite remark, and if it be an evil, demands that we speak out upon the subject. Moral evils never cure themselves. The downward drag of our moral natures is such as to require moral force, actively applied, to lift it up.

In England, and in many of the States, the law gives the successful attorney advantages which are unknown in other States. He recovers costs which embrace respectable fees, and he has also a lien upon the judgment for his reasonable charges. Elsewhere his claim is simply that of any creditor, and he often gets nothing. I call to mind a cause in the prosecusion of which counsel had labored for years, had tried it twice before a jury, and once in the Supreme Court, and finally had recovered judgment. An attempt to defraud was fastened upon the defendant, and to revenge himself upon the attorney he made friends with the irresponsible plaintiff, and paid him the judgment. The attorney had recovered a just claim, which, without long and patient labor would have been lost, he had earned a liberal fee, yet his grateful client, under advice of his late antagonist, left the State without paying him a dollar. If a mechanic should have a lien upon the work of his hands, and the sailor or boatman upon his craft, I know not why a lawyer should not also have a claim upon the judgment he recovers. Deprived of taxable costs, and deprived even of a claim upon the judgment, it is not altogether unreasonable to claim exemption from some of the restrictions as well.

There are many having just claims, who are unable to employ counsel unless they are paid out of the proceeds. Also the statute may compel a plaintiff to give security for costs, and this he is sometimes unable to do, unless some one assumes a responsibility which a prudent man would avoid. This claim may be all the poor man has; if in order to secure counsel fees and costs he sells an interest in it, it may be champerty, if he is aided without consideration it may be maintenance, and so the demand must be surrendered. But if allowed to sell an interest at all, it must be a contingent one, and why not to the attorney who prosecutes it?

There are, however, grave objections to the practice of taking contingent fees, in other words, of purchasing a contingent interest in a claim, in order to provide for the expenses of its prosecution.

1st. It encourages litigation. Often legal claims had better sleep. The claimant may be magnanimous so long as the prosecution must be at his own risk, while, if it could be pursued at another's, even in part, the prospect of gain

and perhaps revenge, unchecked by the fear of loss, would arouse his sense of justice and make his duty clear. It may be an honest demand, but often, how much better that such demands be waived. The strife, perhaps permanent estrangement of the parties, extending sometimes through a community, as friends and neighbors range themselves upon one side or the other, accompanied it may be by serious breaches of the peace, is an evil of such magnitude as seldom to be compensated by the success of the right party, to say nothing of the risk that the wrong one will win. I do not agree with Ihering in regard to one's duty to go to law. It surely should be one's right to suffer a wrong, and it may become a duty to do so. Whether a duty or not, to thus suffer is often for one's interest; the expenses of a legal prosecution, the uncertainties incident to all controversies, especially under our imperfect mode of administering justice, will cause a prudent man to pause and count the cost. The travesty upon the common-law jury trial, adopted in some of our Western States, by which the trial judge is made little more than a presiding officer to assist the sheriff in keeping order, renders results in such States still more uncertain. A man should, therefore, weigh his cause and probable results before beginning a suit. He will see his own side of a controversy with sufficient clearness, and be sufficiently combative not to need special inducements. Besides, the law favors the settlement of disputes, the compromising of matters already in litigation, and without fraud or mistake, the court will not reopen a controversy even if the rights of one of the parties have been surrendered. By a sale of a contingent interest one may have so bound himself as to make a compromise impossible. To dismiss his action he must violate the contract with his attorney, which an honest man would not like to do, whether the transaction be held to be champerty or not. If the contract be sustained he is liable to the attorney, not for fees, but for the value of the interest he had agreed to give.* He has thus put it out of his power to do what the policy of the law has always favored, and what in the uncertainties of litigation, it may be for his interest to do.

2nd. It changes the relation of counsel to the cause. To be admitted to the bar is to become a sworn officer of the court. As such officer, the lawyer is bound by its rules and obligations as much as the judge or any other officer. The fact that he is not the judge, bound to impartiality between parties, the fact that he is not the sheriff, bound to discover and procure the seizure upon execution of property of his client, the fact, in a word, that his peculiar duties and obligations are not those of other officers, make him none the less an officer, and his duties and obligations none the less imperative. No one would feel safe if pecuniary motives were suffered to be addressed to a judge or sheriff, bearing upon the discharge of his duties. The zeal of partisanship and the ambition to win are incentives strong enough to test the integrity of most lawyers, and when we make him a partner in the prosecution, a real plaintiff, though a concealed one, may we not add a motive to unprofessional conduct too strong for his moral endurance. We every day see men treading the very verge, if not going beyond

* See Duke *v.* Harper, 2 Mo. App. 1.

the line which one may not honestly pass. We see them, and not without reason, suspected of deception, of trickery, and even of subornating perjury on behalf of clients, and under the pressure of only ordinary motives. To add the strong one of a personal interest in the result, may well blind one to the character of acts, the counsel merely might have been able to see.

3rd. It degrades the profession. I do not expect the modern lawyer to take the place of the aristocratic Roman jurisconsult, whose reward for the labor of studying and expounding the law was the fame, the influence and often the official positions they gave him; nor would I make his claim merely an honorary one. No class work harder than successful lawyers. To none is society more indebted than to the industrious and upright members of the bar, and I know no reason why they should not be paid like other workers. But the service should not be made the subject of a gambling venture. Reward for labor is one thing—speculation in chances is another. To receive a reward for honest work, and an adequate one, is honorable to him who receives and to him who pays. As an honest trade, each party feels the benefit, the sense of justice is satisfied and the transaction is not disturbed by the feverish excitement of a mere speculation. As gambling corrupts trade, changing the stock board or the corn exchange into a mere gaming resort, converting that which was designed to facilitate legitimate exchange into an excited arena of combatants with fortune, substituting the honor of the gambler for the obligations known to the commercial code, so, if the lawyer is taught to look to chance results for his gains rather than rely upon rules of justice and fair dealing, his mind will be diverted from professional duty to the calculation of chances, will be disturbed by its resultant fever, and he will necessarily become a poorer lawyer and a worse man. Fortunes have been made by this class of fees. Men have taken them who have had and who are entitled to public confidence. Yet I cannot but feel that the general effect upon the bar has been bad. Those eminent attorneys, who by successful draws, have thus received rewards out of all proportion to the value of their services, who are thereby enabled to ape the style of the shoddy contractor, or the successful speculator or gambler, become objects of envy and imitation to all their less successful brethren. Lawsuits become their lottery; and labor for a certain but moderate reward becomes a tame business. When applied too, or, more often, when they have hunted up a stale or sleeping demand, perhaps for unliquidated damages so trifling in fact as to be forgotten, but to be so exaggerated, if not simulated, as to wake the sympathy and imagination of a jury, or perhaps for valuable land for which the claimant, or his ancestors, or their vendors have once been paid, their first thought is how much they can draw from this scheme, not how much they shall earn. Need I describe the effect of such scheming upon character, upon that nice sense of duty and of right that one should cherish as more precious than the apple of his eye?

Our whole moral atmosphere is corrupted by the passion for sudden wealth. The slow accumulations of industry are despised. The healthy glow of honest toil gives way to the fever of gaming ventures The moral instincts, fed by such toil and its due reward, find only poison in the latter, and it is no wonder

that under the stimulus of such potions, the pathway of life is strewn with the skeletons of those who have mistaken it for wholesome food. Can the lawyer escape the moral influence of that which has proved so fatal to tradesmen, to bankers, to all indeed in whom this passion is roused? His occupation brings him into daily contact with them, his skill is in requisition to right the wrongs they have inflicted, or defend them from the penalties they have incurred. He sees, also, the prosperity of the few who succeed in their ventures and are able to surround themselves with the show of wealth, and he can look through the tinsel to the unrest and vulgarity beneath. Yet how few are strong enough to estimate things as they are, at the value they are known to possess, and not be blinded by external show, and how few are superior to the passion for mere wealth, without regard to the terrible sacrifice its gain may demand.

I would not have one despise property nor would I censure its accumulation. Lawyers are not monks, nor should they be content to be beggars. The ambition to accumulate is laudable and when gain is the product of industry and frugality, when it involves no sacrifice of duty nor the subordination of the higher powers, it is rather an honor than a reproach. The rich man in the Gospels was not condemned for his riches, but because he trusted in them, knew nothing higher or better ; and the lawyer who seeks property, seeks a good thing, that which is desirable to have if the price be not too great. I only censure a method that arouses all the passions of a gambler. The supremacy of such passions must be at the expense of qualities essential to the character of a good man and a good lawyer. They tend to destroy his love of truth for truth's sake, of study for the knowledge and intellectual power it brings, and to blind every nice moral perception. Such passions with kindred appetites will never develop a Marshall or a Kent.

But after all, what if we always remain poor. It may be an evil, but it is far from being the greatest one. It may be, it often is, a blessing.

The merely rich have their worshippers, but of what sort. They may be able to buy much brick and much marble, to live in palatial halls with troops of servile attendants, to ride in gilded carriages and sport costly furs and diamonds, bnt how essentially vulgar is all this! Unfortunately for the future of our democracy, they may be also able to buy seats in legislative halls, to reach positions due only to worth, but the popular heart makes fruit thus plucked but ashes. The millionaire is at a disadvantage, especially if he has become such while in public life. He may be honest, but people will not believe it. The corrupt, by party machinery, may put him forward in the belief that he will use his opportunity, if not his money, for their benefit, but their success only places him in the stocks for missiles and jeers, not only from passers-by, but from history if it shall deign to notice him. Success in buying a seat—say in the United States Senate—gives its buyer but a cushion of thorns. No such man ever has or ever will, acquire a respectable standing unless with retainers and co-corruptionists. Hate may be exchanged for sneers, or *vice versa*, but for love and trust never.

Our very poverty may be the stimulant needed for success ; constitutional

laziness may be overcome in no other way. Poverty, at least very moderate means, may be the necessary ladder for a great ambition. The great and noble among men, those who have impressed their ideas upon the generations, have not been rich. Aristotle was dependent upon patronage; Socrates, as he goaded the gilded fools around him, was almost barefoot; and a greater than Socrates had not where to lay His head! I would not sermonize, but would have it felt that there is something higher than wealth, that man is more than money.

4th. Aside from the corrupting tendency of speculative fees, they have the effect, by giving undue prominence to the idea of money making, to divert attention from professional learning. The ruling idea gives character and direction to one's thoughts. It has always been remarked that it is impossible for a lawyer without loss to engage in other business, or any kind of speculation, or even to give much attention to political discussions. If he devotes himself to his business, constant in his reading and legal researches, he will have fees, but will have little time to consider the money question as such, and the latter idea can take possession of his mind only at the expense of his strictly legal pursuits. The great lawyer is seldom a good speculator. A single heavy draw in a speculative suit may have the same effect, as to draw a large prize in an ordinary lottery, that is, to give a distaste for the ordinary results of industry, a distaste for causes and the labor accompanying them, when only ordinary fees are received, a distaste for study without the stimulus of similar gains, and will be likely to operate in the end to make him who has unfortunately been so successful, poorer in purse, much poorer in professional attainments, and especially poor in professional honor.

5th. An objection also arises out of the relation of the parties. It is confidential and fiduciary in its character. The attorney holds himself out as the trusted friend and confidential agent of all who may come into relations with him. It is true, this relation may not become actual until the retainer, present or prospective, is accepted, yet every step that so results should be, not only fair and honest, but in the interest of the client. The attorney is his agent, his trustee, and is bound, so far as he honestly may, to consult his interest. This confidential relation should prevent any business transactions between them. Trustees and beneficiaries may not deal together; the dealing, if not wholly forbidden, is tainted, and for very slight reasons the courts will condemn it. To obtain an interest in the result of a suit, however paid for, is to purchase an interest in a chose in action, and the relation of client and attorney is changed to one of partnership. Such dealings, whether in contemplation of the relation, or after it is consummated, are like all other dealings between trustees or agents and their beneficiaries or principals, and how they are regarded, every lawyer knows.

It may be said that when the contract is made the parties are dealing as strangers. But this is not true. The moment the client lays his case before the attorney, the confidential relation begins. The attorney, as frequently ruled by the courts and because of this relation, is forbidden to disclose any communication he may make, and this, whether he receives a fee or is in fact employed or not. He may, in civil cases, refuse to take his case, but if he takes it, every step must be in the interest of his client.

But admit that their relation when making the contract is not that of attorney and client, then they are negotiating for a special partnership, the one is selling and the other is purchasing an interest in a chose in action or in property to be claimed. The purchase is made, it does not matter whether with money or with promised service. When, then, does this special partnership cease, and when does the relation of attorney and client begin? Do they not hold both relations? And should not they both be the parties to the record? If the attorney did not act as such when he purchased his interest, he is like any other purchaser, and, while at common law he could not be a party plaintiff, not having a legal interest, in equity and under the code he should be joined as one of the real parties in interest. He is "united in interest" with his so-called client, and should at least share the odium of pursuing a perhaps disreputable claim. One comes into court exonerated from any personal responsibility; he is not responsible for the tricks of his client, he stands upon a high plane and looks an honest judge and honest lawyers in the face, as though he were like them; he is employed only to see that the legal rights of his client are protected. The client may be dishonest, he knows not, but he, his counsel, will be governed, in conducting the case, by all the rules that regulate the conduct of honorable members of the bar: and he is permitted to hold this representative relation undefiled by the nature of the claim, when in fact he is but a partner in his client's iniquity. If our old wholesome laws against champerty are not to be enforced, at least let courts obey the Practice Act, and compel the partner to place his name upon the record as such.

If we are led to condemn the practice of taking contingent or speculative fees, it does not follow that it is necessarily morally wrong under all circumstances. We have nothing, in this connection, to do with the law bearing upon the subject. Contracts for such fees may or may not be enforced by the courts, and they will be held to be obligatory, or contrary to public policy, without much regard to the circumstances under which they are made. But, in *foro conscientiæ*, the circumstances and the terms of the contract have much to do with its character. One has a meritorious claim and little or no other property; if he recovers he can afford to pay a liberal fee, if he fails, it would be impossible or difficult to pay anything. He asks his counsel to accept a liberal sum, something more than an ordinary fee, if the claim be recovered, upon condition that nothing, or a very small fee, be charged upon failure. Now, the evils arising from these contracts may be so great as to require that even this arrangement be condemned, not as wrong in itself, but as countenancing that from which great evils arise. But unconnected with the general influence of the practice, it would seem that this would be an innocent arrangement, provided its terms were fair and reasonable, and provided the proceeding was not set on foot by the attorney. But under cover of a willingness to aid the claimant at the risk of receiving no compensation, it will not do to oppress him on account of his poverty, by a charge, contingent though it be, largely in excess of the value of the service. Many, perhaps most, at once become equal partners with their client, and for professional aid alone, contract for half of the proceeds of the suit. There may

be a claim when this would not be an unfair proportion, if any proportion is to be tolerated, but this is not ordinarily so.

I will suppose a proceeding under the statute for negligence resulting in death. The verdict, if for the plaintiff, as it is very apt to be, is sometimes fixed by statute at five thousand dollars, and, if not so fixed, it seldom falls below that sum. Or, in a proceeding against a railroad company for injuries where death does not result, the damages are usually high. When the cause is really a meritorious one, the injured party or his representatives may be justly entitled to all that may be recovered, and even that may be a poor compensation. But in the contract supposed the attorney takes half. Are his services ordinarily worth from one to three or five thousand dollars? and for the reason that the amount recovered is all that the plaintiffs have? The facts are usually simple—there should be but one jury trial, although a new one may be granted, and an intelligent client, with a knowledge of the case, and where there is no combination at the bar, will hardly make such a contract. But the persons suffering are usually women or children, and to exact that amount would, in most cases, be oppressive. It is a lawyer's duty to undertake the cause of the poor, if a worthy one, and run his risk as to compensation, unless he decline for reasons other than the fact of poverty.*

In this connection something further should be said in regard to the extent, the amount which may be considered a just compensation for services, whether the charge be conditional or absolute. Of course no precise rule can be given; the same service by the same man may be worth at one time more than at another, and one man may be entitled to command more than another. But, while the matter must necessarily be left chiefly to the arrangement of parties, we sometimes hear of fees, if they may be so called, so out of all proportion to the value of the service as to shock our sensibilities. The actual owner of the money or property paid or donated, it may be said, has a right to do what he will with his own, and if his attorney shall receive it, who can complain? Call it a donation if you will, it is the attorney's good fortune, and no one is wronged. But it should be remembered that the attorney holds such a confidential relation towards his client that he cannot receive from him a gift. The law presumes undue influence, and forbids it. Besides, it is seldom free in fact, but is exacted by the recipient, and under circumstances that create a seeming necessity. The donation, however, is not usually the property of the one who makes it. Executors or other trustees may feel at liberty to give freely of the subject-matter of their trust when they might have been more scrupulous had it been the fruit of their own labor. Directors of a railroad corporation may have a friend whom they wish to benefit; or may have become so accustomed to deal in large sums as to make ordinary items seem petty, or for other or less excusable reasons, have become indifferent to the interests of the stockholders, and, out of other people's money, give tens of thousands of dollars for work that may be worth but hundreds. These things are not habitually done, but the instances are suffi-

*See the old French rule at the close of this article.

ciently numerous to have arrested public attention. Are those lawyers whose chief aim is to make all they can out of everything that comes into their hands, who demand what they think they can get without reference to what they earn, and who hence may have built up fortunes, the ones to be deemed successful lawyers? Shall we make of them examples or beacons?

To illustrate: an estate is to be settled, the dispute arising perhaps in regard to the validity or construction of a will. Instances are not unfrequent where large fortunes have been dissipated in these disputes, and chiefly by paying exorbitant fees. I have heard of an instance where a distinguished lawyer received a retainer of fifty thousand dollars on behalf of a rich estate in anticipation of an effort to break a will which was not in fact contested. On what principle, if we acknowledge any rule of right that should regulate the charge of counsel than the right to get all he can, could such a charge be justified, and how could the executor justify himself in paying it? Again, the directors of a great corporation—say a railroad—desire to perfect some contrivance or organization that shall enable them to profit personally and largely from the construction of the road. The object is itself illegal, for they can only work in the interest of the stockholders. But the temptation is great, and they look about for some astute lawyer that shall be able to draw up a successful plan. It is a work which of itself is wrong—no lawyer has a right to devise the means of fraud—but as money will tempt trustees to violate their trust, so money will blind some lawyers to the ethical character of their work. One is found sufficiently able and sufficiently unscrupulous, and for a compensation of, perhaps, two or three thousand dollars a day for his work, and an interest in the job, a safe plan is contrived. Another corporation—also likely to be a railroad, holds a demand, perhaps against the Federal government, perhaps some corporate body. The amount is large, perhaps a hundred thousand, perhaps a million. An arrangement is made with an influential lawyer, one who prides himself upon his ability to control political bodies, to collect the claim for perhaps one-fifth, perhaps one-half, the demand. He succeeds, and receives for his services ten, twenty, fifty thousand dollars or more for labor, that at a fair valuation—upon any acknowledged basis of compensation—would be worth from a hundred dollars to perhaps two or three thousand. If the claim be an honest one, the stockholders of the corporation are entitled to the whole, less the necessary and proper expenses of collecting; if it be simulated, the lawyer, as well as the directors, are guilty of fraud. It may be said that prosecutions of this nature are not professional, that those who engage in them do not do so as lawyers, but as claim agents. This, except as to those pursued in some court, is perhaps true—but a claim agent, or any other agent, acts in the interest of his principal and cannot deal with him to his disadvantage—I have also known instances of lawyers acting as attorneys of assignees, or who have become themselves receivers of the assets of insolvent corporations, and who came out with large additions to their fortunes; but of course, the stockholders lost everything and the creditors almost everything. This was quite common in the frequent crash of the old State Banks—it is now sometimes seen in the wrecking of insurance companies and railroad corporations.

I close by giving two or three rules which were prescribed in respect to the conduct of the old French advocate, the order known as the *Noblesse de la Robe*. Under a government wholly despotic, amid a nobility corrupt and debased, while the peasantry were brutalized by superstition and slavery, the French lawyer was still enabled to command the respect of all the classes, and these rules are the same substantially that are recognized as obligatory upon the English counsellor. Among a variety of them I find the following :—

The advocate was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

He was not to make any bargain with his clients for a share in the fruits of the judgments he might recover.

He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed.—P. BLISS, in *American Law Review.*

Reviews and Notices of Books.

The Magistrates' Manual, being Annotations of the Various Acts relating to the Rights, Powers and Duties of Justices of the Peace ; with a Summary of the Criminal Law. By S. R. CLARKE, Barrister-at-Law. Second edition, pp. xxiii.-591. Toronto : Carswell & Co.

After the usual preliminary matters, such as contents, preface, and table of cases cited, there is an introductory chapter of thirty-one pages, dealing with the appointment of magistrates, their qualifications, ministerial and judicial functions, the territorial limitations governing their jurisdiction, and a variety of other subjects of a general character. The Criminal Procedure Act, the Speedy Trials Act, the Summary Trials Act, the Juvenile Offenders' Act, and the Summary Convictions Act follow in order, each of them being fully annotated, with copious references to, and extracts from, decisions of the English and Canadian courts. Each of these Acts has its accompanying forms, and there are also supplementary forms not given in the Acts. These statutes, with annotations, etc., occupy 307 pages. The author then gives us a summary of the Criminal Law of Canada, under its different heads, arranged alphabetically. Each statement is supported and illustrated by references to decisions of the courts. This summary occupies 217 pages. An index of about 35 pages completes the work. It will be observed that the Ontario Statutes which have to do with justices of the peace are not inserted at length or annotated. The discussion of them is confined to the summary already mentioned, reference being made to each statute under the offence to which it relates. The reason for this arrangement doubtless is that, " In the Province of Ontario, by virtue of chapter 74 of the Revised Statutes, in reference to penalties or punishments imposed under the authority of any Statutes of the Province, the procedure before justices of the peace is assimilated to that prevailing under the Statutes of Canada."

A Manual of the Constitutional History of Canada, from the earliest period to the year 1888; *including the British North America Act*, 1867, *and a digest of judicial decisions on questions of legislative jurisdiction.* By J. G. BOURINOT, LL.D., F.R.S., Can., Clerk of the House of Commons of Canada, and author of works on Parliamentary Practice and Procedure in Canada, Local Government in Canada, etc. Montreal: Dawson Bros.

Dr. Bourinot's qualifications for the work he has undertaken in this useful little volume are too well known to need enumeration in our notice of it. In a prefatory note he tells us that it is in a large measure a revised publication of certain chapters of his larger book on Parliamentary Practice and Procedure in Canada, which has been recently placed on the list of books required for the study of political science in the University of Toronto; and that it has, therefore, been thought desirable to publish them separately in a cheap and convenient form, and with such additions and alterations as will make the sketch of the constitutional system of the Dominion, whose institutions are now attracting considerable attention in other countries, complete down to the present time.

In pursuance of this intention, he has, in the fifteen chapters into which the work is divided, treated succinctly, and yet with sufficient detail of facts and circumstances, the following subjects:

1. Canada under the French *régime*.
2. Its Government from 1760 (the date of its cession) to 1774.
3. The Quebec Act, 1774, the first Act of the British Parliament respecting Canada.
4. The Constitutional Act of 1791, by which representative government was first established in Canada, divided into the two Provinces of Upper and Lower Canada, with a local parliament in and for each.
5. The Union Act, 1840, reuniting the two provinces, as the Province of Canada, under one Parliament and Government, consequent upon the elaborate report of Lord Durham on the political difficulties under the former constitution.
6. The Federal Union of the Provinces, under British North America Act, 1867, uniting the three Provinces of Canada, Nova Scotia and New Brunswick, as the Dominion of Canada, under one Parliament, with legislative power over the whole Dominion, except on such matters as were not assigned exclusively to the legislatures of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick respectively, into which it divides the Dominion, with provisions for the admission of British Columbia, Prince Edward and Newfoundland into the union with the consent of those Provinces respectively, and for the acquisition of the North-West Territories, and the creation of the Province of Manitoba out of part of it.
7. The Constitution of the General Government of the Dominion.
8. The Constitution of the Dominion Parliament.
9. The Constitution of the Provincial Governments, and organization of the North-West Territories.
10. The disallowance of Provincial Acts. Powers and responsibilities of the Dominion Government in this respect.

11. The distribution of legislative powers. Those of the General Government, and those of the Provincial Governments respectively; concurrent powers and difficulties as to jurisdiction.

12. Judicial decisions on questions of legislative jurisdiction.

13. Judicial decisions on such questions—the subject continued.

14. Rules of construction and constitutional principles evolved from judicial decisions.

15. Position of the judiciary in Canada.

In an appendix Dr. Bourinot gives the full text of the following Acts of the Imperial Parliament: The British North America Act (30-31 Vict. chap. 3); "An Act respecting the establishment of Provinces in the Dominion of Canada" (34-35 Vict. chap. 23); "An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under section eighteen of the British North America Act, 1867" (38-39 Vict. chap. 38)—to which we think he should have added the short Act (49-50 Vict. chap. 35); "An Act respecting the representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province," under which two members have been added to the Senate, and four to the House of Commons by the Dominion Act (49 Vict. chap. 24).

We have thus given some, though, of course, a very condensed, account, of the contents of the volume before us; and when we add that, after careful examination, we feel that Dr. Bourinot has in it fully maintained his reputation for accuracy and fairness, as well in his statement of facts and his careful analysis of the important documents to which he refers, as in the faithful reproduction of those he inserts at length; and his remarks and opinions on the subjects to which they relate, we think we are justified in the epithet we have applied to his work as a "useful little volume," and in recommending it to our readers, as one which may be advantageously acquired and used by every Canadian who wishes to have at hand a succinct and correct account of the Constitution under which he lives, and the steps by which it has been gradually brought to its present form. What these steps and that form are, the doctor has eloquently described in his closing paragraph, backed by the words of the Marquis of Lorne, in his reply to the farewell address of the Canadian Parliament, on the 25th of May, 1883.

Notes on Exchanges and Legal Scrap Book.

LIABILITY OF LANDLORD.—The Supreme Judicial Court of Massachusetts decided in *Dalay* v. *Rice et al.* that if a landlord lets premises abutting upon a way, which are, from their condition or construction, dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair. The fact that the tenant is also liable affords the landlord no defence.—*American Law Register.*

QUIT-CLAIM DEED AS CONSIDERATION FOR A BOND.—The Supreme Court of Pennsylvania, in *Goettel* v. *Sage et al.*, held that where a vendor, believing that he has a good tax title to land, so states, but declines to covenant or to convey, except by a quit-claim deed, and upon his advice, the vendee consults an attorney, by whom the title is pronounced valid, whereupon the vendee gives a bond for the purchase-money, he may, nevertheless, in an action on the bond, show that the tax sale upon which the vendor's title rested, was utterly void, and consequently that the bond was without consideration.—*Am. Law Register.*

Correspondence.

RE ACT RESPECTING THE DEVOLUTION OF REAL ESTATE.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

From a matter that came into my hands, I find that the above Act may work greater changes than appear at first sight, without much benefit thereby.

The following are the circumstances of one of the cases in hand. A person died intestate, leaving heirs all of age. They agreed to sell the farm left by their father. Can they execute a deed direct to the purchaser, or is the legal estate held in abeyance until a personal representative is appointed? The latter opinion is held by an eminent firm of solicitors, who refuse to accept the deed signed by all the heirs-at-law, and a declaration that they are all the heirs, and of full age.

Again, if a testator devises lands, must the devisee claim title under the will, and register it as part of the claim of title; or, must the executor's deed be obtained before the devisee's title is complete?

A case in this vicinity is as follows: A man died intestate, leaving issue, some of age, and others minors. One farm is all paid for, and another, lately purchased, is under mortgage for $2,000. To administer both real and personal estate in order to get a title of the realty, will make it necessary to furnish bonds to about $8,000, "having regard to the value of the realty." Now, where are the neighbors that will set their names to a bond of such an amount, and for a liability that may not be dischargeable for twenty years?

It appears to me that the Devolution Act requires considerable amendment to make it workable in this Province, and that it should be so altered as to make it appear plain that a son is the devisee or heir of his father without the confirmatory grant of the executor or administrator, as the case may be.

SOLICITOR.

DIARY FOR JULY.

1. Sun.....*5th Sunday after Trinity.* Dominion Day. Long vacation begins.
2. Mon....C. C. sittings for motions, except York.
3. Tues ...Quebec founded, 1608.
7. Sat.....C. C. sittings, excepting York, end.
8. Sun.....*6th Sunday after Trinity.*
13. Fri. ....Sir John Robinson, 7th C. J. of Q. B., 1829.
15. Sun.....*7th Sunday after Trinity.*
22. Sun.....*8th Sunday after Trinity.* W. H. Draper, 9th C. J. of Q.B., 1863. W. B. Richards, 3rd C. J. of C. P., 1863. Act uniting Upper and Lower Canada assented to, 1840.
24. Tues ...Lundy's Lane, 1814.
28. Sat.....William Osgoode, 1st C. J. of Q. B., 1792.
29. Sun.....*9th Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [May 28.

THOMPSON *v.* ROBINSON AND WILSON.

Solicitor and client—Breach of duty by solicitor—Liability of partner—Scrivener's business.

The defendants, who in 1878 entered into partnership as solicitors, carried on as part of their ordinary business that of investing moneys for clients. Previous to the partnership, the defendant R. had been employed by the plaintiff to do that kind of business for her, and during the period of the partnership the whole of the money originally entrusted to R. was lost, through a breach of duty on the part of R. in investing the plaintiff's money. From the commencement of the partnership down to March, 1883, after which time the breach of duty occurred, the account of the plaintiff was kept in the books of the firm, charges for services rendered were made against her, though not for the management of her affairs or for services in making investments, and were also made against borrowers from her funds for conveyancing, and the profits went to the account of the partnership.

The evidence showed that the plaintiff insisted upon dealing with R. as her special adviser and solicitor, that she disliked W., and never consulted him as to her affairs, and that she wished her affairs to be kept as free as possible from the knowledge of anyone but R.

It also appeared from the evidence that R. was to share in the profits arising from the investment which resulted in the loss of the plaintiff's money, and that he did not make any charge for services in connection with it.

Another fact shown was that R. during part of the period of partnership kept the plaintiff's accounts in a book which he called his private ledger.

Held, that in making the investment R. was acting as solicitor for the plaintiff, and that he and his partner, W., were both liable for the breach of his duty. The fact being established that down to March, 1883, both defendants were dealing as a firm with the plaintiff's affairs, the onus was thrown upon W. of showing that his liability for the subsequent acts of his partner was terminated with the assent of the plaintiff; and as the evidence did not show that W. had given the plaintiff to understand that his liability was at an end, she was justified in believing that it was continued, so long as the defendants remained in partnership; and none of the circumstances mentioned above operated to absolve W. from liability.

Semble, that in this Province the business which is called scrivener's business is a part of the ordinary business of a solicitor.

Osler, Q.C., and *Douglas*, Q.C., for the plaintiff.

W. Cassels, Q.C., for the defendant Robinson.

Moss, Q.C., for the defendant Wilson.

Full Court.] [June 4.

REGINA *v.* SELBY.

Criminal law — Forgery — Corroboration — Interest of witnesses—R. S. C. c. 174, *s.* 218.

The defendant was convicted of uttering, with knowlege that it was a forgery, the indorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank, but given up and destroyed before maturity, upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave

evidence of the forgery, and the three members of the firm of Taylor Brothers were also called as witnesses and denied having indorsed the note, or having any knowledge of it.

Held, that neither the members of the firm of Taylor Brothers, nor the bank managers, were persons interested or supposed to be interested in respect of the indorsement, within the meaning of R. S. C. c. 174, s. 218, and their evidence, therefore, was sufficient to corroborate that of the other witness.

Irving, Q.C., for the Crown.

Osler, Q.C., for the defendent.

Full Court.] [June 23.

REGINA *ex rel.* JOHNS *v.* STEWART.

Municipal elections—R. S. C. c. 184, ss. 187-188—Corrupt practices—Procedure—Quo warranto—Summons or information.

All proceedings taken to contest the validity of any election mentioned in s. 187 of the Municipal Act, R. S. C. c. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by s. 1882, and not by information in the nature of a *quo warranto*, or otherwise.

Aylesworth, for the relator.

McCarthy, Q.C., for the respondent.

Full Court.] [June 8.

REGINA *v.* GORDON.

Liquor License Act, R. S. O. (1877) *c.* 181—*Summary conviction—Absence of police magistrate from city—Jurisdiction of justices of the peace.*

The defendant was convicted by the police magistrate of the City of Toronto for an offence committed at Toronto against the Liquor License Act, R. S. O. (1877) c. 181, s. 39. Sec. 68 of that Act makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace and remanded till the day on which he was convicted.

Held, that the information was properly taken before one justice under the provisions of sec. 6 of the Summary Convictions Act, which is made applicable both by R. S. O. (1877), c. 181, s. 68, and R. S. O. (1877), c. 74, s. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 Vict. c. 4, s. 7, the defendant was legally convicted.

Murdoch, for the defendant.

Badgerow, for the complainant.

Full Court.] [June 23.

REGINA *v.* BROWN.

Canada Temperance Act—Disqualifying interest of magistrate—Rejection of evidence to show interest—Award of costs—Inspector's fee—Interpreter's fee—Evidence of prior conviction—Jurisdiction of magistrate—Certiorari.

Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act:—

1. It was contended that the magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate, with an alleged bias in favor of the prosecution in cases under the Act. It was not shown that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it.

Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting.

Regina v. *Klemp*, 10 O. R. 143; *Regina* v. *Farrant*, 20 Q. B. D. 58; 4 Times L. Reps. 43 and 87; and *Regina* v. *Justices of Cumberland*, 4 Times L. Reps. 294, referred to.

2. At the hearing before the magistrate the defendant attempted to show by witnesses that the magistrate had a disqualifying witness interest in the case, but the magistrate refused to admit such evidence.

Held, that the evidence was inadmissible, and even if admissible, the rejection of it would not afford grounds for quashing the conviction.

Rex v. *Justices of Cambridgeshire*, I. D. and R. 325; *Rex* v. *Justices of Carnarvon*, 4 B. and Ald. 86; and *Regina* v. *Dunning*, 14 O. R. 52, referred to.

3. It was also contended that the magistrate exceeded his jurisdiction by ordering the defendant to pay $3 as inspector's fees, $2 for an interpreter, and $1 justice's costs.

Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under s. 58 of the Summary Convictions Act, as to the justice seems reasonable, and an interpreter may properly be treated as a witness.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and *certiorari* would not therefore lie (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction.

4. The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the fact, but only the evidence of it.

Held, that the question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive.

Brittain v. *Kinnaird*, I. B. and B. 432; *Regina* v. *Mullen*, 4 O. R. 127, referred to.

Held, also, that the provisions of s. 115 of the Canada Temperance Act are directory only.

Aylesworth and *Hewson*, for the defendant.

Delamere, for the complainant.

Full Court.] [June 23.

REGINA *v.* CATON.

Transient traders—42 Vict. c. 31, s. 22—Munipal by-law—Conviction.

The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall offer goods, wares and merchandise for sale within the limits of the town of M. without, or until, he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandise, contrary to the by-law.

Held, that the by-law was sufficiently within the powers given by 42 Vict. c. 31, s. 22, to warrant the conviction; and that the words in the by-law "less than one year" were but a limitation of the words "temporary periods," used in the statute, and did not vitiate the by-law; But

Held, that the want of an allegation in the conviction that the defendant was a transient trader whose name had not been duly entered in the assessment roll for the current year, was fatal.

J. B. Clarke, for the defendant.

Aylesworth, for the complainant.

Street, J.] [June 20.

In re BRITISH CANADIAN L. & I. CO. AND RAY.

Vendor and purchaser—Power of sale in mortgage—Variations from Short Forms Act—Notice of sale to incumbrancers.

The vendors were selling land under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default the mortgagees entered, and after having done so made the contract for sale, having served notices of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others.

Quære, whether the variations in the power from the statutory form prevented the Short Forms Act from applying.

Held, that if the Act were applicable the power of sale was properly exercised; if the Act were not applicable, then, taking the

words of the power in their strictest sense, the vendors have done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all.

R. Grant, for the vendors.

Middleton, for the purchaser.

Divisional Court.] [June 23.

STODDART *v.* WILSON.

Insolvency—Preference—Chattel mortgage to insolvent's wife—Application of wife's property to payment of creditors—R. S. O. (1887), c. 124.

W., being in insolvent circumstances and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him, and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received.

Held, reversing the judgment of ROSE, J., at the trial, that the chattel mortgage was void as against W.'s creditors, under R. S. O. 1887), c. 124, and that it did not come within any of the exceptions in s. 3.

Per STREET, J., that the necessary preference of a particular creditor placed the transaction outside of the class which it was the intention of the legislature to protect.

Gibbons, for the plaintiff.

James Parkes, for the defendants.

Chancery Division.

Boyd, C.] [April 9.

LOCKING *et al. v.* HALSTEAD.

Vendor and Purchaser—Mortgage for costs—Sale under power—Title—Recovery of deposit.

Plaintiff was a purchaser at a sale held under a power of sale, in a $200 mortgage taken for costs only, $30 of which had been incurred at the date of the mortgage, and paid his deposit.

Before the purchase was completed, the mortgagee's right to sell, was raised as a question of title; but nothing was done to make same good, and no evidence was given to show any amount due for costs until the property was sold again under a prior mortgage.

Held, that the mortgage was a valid security for no more than $30, that the mortgagee should deal with the security, so as not to prejudice the mortgagor by a harsh and oppressive exercise of the power of sale, that the purchaser having notice would occupy no better position than the sole mortgagee, that a foreclosure for the full amount could not be upheld as against the application of the mortgagor to pay what was really eligible under the security, that the plaintiff was justified in refusing to complete the purchase, and was entitled to recover back his deposit paid.

Hoyles, for the appeal.

Bain, Q.C. and *Field*, contra.

Boyd, C.] [April 9.

TELFER *v.* JACOBS *et al.*

Easement—Right of way—User of—In connection with property to which it was appurtenant—In connection with adjoining property.

P., being the owner of a certain block of land, sold the southerly portion of it to the plaintiff, T., and granted therewith certain rights of way over his remaining portion, but reserved certain rights of way over the portion sold to himself and *his heirs* (this was by a subsequent deed extended to *his assigns*, which words were omitted by mistake), being the owner or owners, occupier or occupiers of the land he now owns immediately to the north of the land hereby conveyed, etc. Some time after the owner of an adjoining property to the west became the owner of a small portion of the land to the north of T.'s land, and to which the reserved right of way was appurtenant, and claimed that by virtue of such ownership he was entitled to a right of way to his adjoining property.

In an action by T. for an injunction to restrain him from using such right of way in connection with such adjoining property it was

Held, that the proper construction of the reservation of the right of way was to connect the use thereof with the beneficial enjoyment of the premises mentioned in the conveyances reserving the right of way, and that it was not intended to embrace a general right of user for all purposes; that there was a general right of user so far as the particular property was concerned which would be enjoyed by every part owner of that property, how small soever his parcel might be, but it did not follow that the user could be extended for the more commodious enjoyment of adjoining land belonging to one of the part owners of the particular property. The user of a right of way for the accommodation of other parcels than the specific one to which it was appurtenant was in excess of the right. The defendant's ownership of part of the land to which the easement was appurtenant gave them the right of way for any purposes connected with the enjoyment of that part of the property, but it conferred no right upon them to burden the lanes over which the right of way existed by using them in connection with the adjoining property to which the privilege was not annexed.

J. K. Kerr, Q.C., for the plaintiff.

James Maclennan, Q.C., for the defendant.

Ferguson, J.] [June 21.

Re THE TRUSTEES OF THE EAST PRESBYTERIAN CHURCH AND McKAY.

Vendor and purchaser—Sale of church property—Publication of notice—Weekly paper—Daily paper—R. S. O. (1887), *c.* 237, *s.* 13.

The trustees in selling some church property under R. S. O. (1887), c. 237, s. 13, advertised on the same day of the week for four successive weeks in a daily paper.

Held, not a sufficient compliance with the provision of the statute directing publication in a "weekly paper" to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered.

Geo. Bell, for vendor.

T. P. Galt, for purchaser.

Practice.

Ferguson, J.] [June 1.

HOWE *et al. v.* CARLAW *et al.*

Will—Devise for maintenance—Expenses covered by devise—Estate charged therewith.

A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for, and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate. The father and mother recently died, and during their last illness certain expenses were incurred for medical attendance, nurses, etc., and after their death, for funeral expenses, and English solicitor's fees, for endeavoring to collect the several accounts for same.

Held, that these expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate.

J. Hoskin, Q.C., for the plaintiffs.

Foy, Q.C., for the defendants.

Street, J.] [June 13.

LALLY *v.* LONGHURST.

Incumbrancers—Mortgage action—Postponement of incumbrance prior in time—Forum for trying question of priority.

C. recovered judgment against L., in 1882, and placed a *fi. fa.* lands in the sheriff's hands, which was ever since regularly renewed; in 1883, L. bought land from the plaintiff, and gave him back a mortgage for the purchase money. In this action for foreclosure, brought upon that mortgage, C., was added as a subsequent incumbrancer in the Master's office, after judgment.

Held, that the plaintiff was not entitled to have the question whether C.'s execution should be postponed to his mortgage determined in the Master's office, or upon motion, unless by consent; the execution being prior in point of time, the order adding C. should be set aside.

The plaintiff was also allowed, following *Glass* v. *Freckleton*, 10 Gr. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority.

Radenhurst, for the plaintiff.

Hewson, for the defendant, Constable.

Rose, J.] [June 19.

REGINA *ex rel.* TAVERNER *v.* WILLSON.

Municipal elections--Addition of new territory to city--Disqualification of voters—R. S. O. (1887) *c.* 184, *ss.* 82, 89.

Where a city made additions to its territory, and thereby included within its corporate limits, a portion of an outlying township.

Held, that, regard being had to the provisions of the Municipal Act, R. S. O. (1887), c. 184, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before such addition; and notwithstanding the prohibition contained is s. 82, of the Act, to the raising of questions concerning the qualification of voters.

A. H. Marsh, for the relator.

Aylesworth, for the respondent.

ELECTION COURTS.

Boyd, C., and Osler, J. A.] [Dec. 12, 1887.

EAST NORTHUMBERLAND PROVINCIAL ELECTION—RICHMOND *v.* WILLOUGHBY.

Election—Agency--Bribery—Illegal Practices -Scheme for violating secrecy of ballot—Elections Act, R. S. O. (1877) *c.* 10, *ss.* 146, 159.

The respondent was nominated by a convention of the Conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a prominent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance, in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters.

Held, that R. was an agent of the respondent.

F. D. was also at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a particular locality, who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters.

Held, *per* BOYD, C., that these men were both to be regarded as agents of the respondent.

R. committed two clearly proved acts of bribery; F. D. and W. D. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; and the evidence developed at least two other acts of bribery, though not by agents, and some suspicious circumstances; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of fifty-one for the respondent.

Held, that the election was void because of the corrupt acts of R.; and in view of the conduct and details of the contest, the saving provisions of s. 159 of the Elections Act, R. S. O. (1877) c. 10, could not be applied.

Per BOYD, C.—The scheme for violating the secrecy of the ballot was an illegal act under s. 146, and had no little significance when taken in connection with the proved acts of bribery. In estimating the application of s. 159, it was impossible to leave out of sight the illegal practices under s. 146.

Lash, Q.C., and *W. R. Riddell*, for the petitioner.

McCarthy, Q.C., and *Ketchum*, for the respondent.

Appointments to Office.

SHERIFF.

York.

Joseph H. Widdifield, Newmarket.

REGISTRAR.

Haliburton.

E. C. Young, village of Haliburton, to be Registrar of Deeds for the provisional county of Haliburton, *vice* Fred Mooney, resigned.

POLICE MAGISTRATES.

Wellington.

W. H. Lowes, Maryborough, for the county of Wellington.

Algoma.

J. Gillies, Gillies' Hill, county of Bruce, for the District of Algoma.

Leeds.

J. A. Shaver, Newboro', for the village of Newboro, without salary.

BAILIFFS.

Grey.

George Brown, Meaford, Third Division Court, *vice* Andrew Watt, who has left the locality.

Dundas, Stormont and Glengarry.

Edward Barclay, Mountain, Seventh Division Court, of the united counties, *vice* Asa Redmond, resigned.

Law Society of Upper Canada.

EASTER TERM, 1888.

The following gentlement were called to the Bar during the above Term, *viz.: May 21st*, 1888. -John Gumaer Holmes, Arthur Stevenson, Robert Alexander Grant, Edward Albert Crease, Charles Horgan, James Richard Code, Archie Foster May, William Halloway Wallbridge, Gordon Hunter, Robert Richard Hall, William Carson Pettigrew McGovern, Ernest Solomon Wigle, Robert Maxwell Dennistoun, William Wallace Jones, Joseph Missett Musson, John Franklin Wills, Charles Howard Widdifield. *June 1st*--Robert Kimball Orr.

The following gentlemen were admitted as students-at-law, *viz.: Graduate Class*--C. L. Crassweller, R. B. Henderson, J. Hales, H. D. Leask, E. Pirie. *Matriculant Class*—J. H. Coburn, H. Lennox, R. L. Reid. *Junior Class*—G. F. Blair, C. L. Mills, W. Carney, H. J. Martin, J. B. Irwin, M. A. Brown, T. C. Gordon, W. T. J. Lee, E. Donald, J.W. Lewis, C. T. Sutherland, H. A. Stewart, A. F. H. Mills, F. W. Gladman, W. B. Bentley.

The following gentlemen were admitted as Students-at-law in the Graduate Class on the 26th day of June, their admission to date as of the first day of Easter Term, 1888 (Rule 6, Section IV.): T. O'Hagan, L. H. Bowerman, A. U. Bain, E. F. Blake, H. C. Boultbee, N. P. Buckingham, T. A. Gibson, T. M. Harrison, T. M. Higgins, W. F. Hull, J. E. Jones, S. King, H. Langford, R. McKay, E. Mortimer, G. Waldron, G. Wilkie.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:--

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History--Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence: Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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THE CONSOLIDATED RULES.

THE Consolidated *Rules* of Practice which have been recently promulgated, and which are to come into force at the end of the present long vacation, are intended to be in effect a complete Code of Practice. The project of framing a code on such a subject was an ambitious one, but a careful perusal of the *Rules* leads us to the conclusion that the object aimed at has by no means been attained. By *Rule* 3, all rules and orders heretofore passed, except certain exceptions mentioned in a schedule, are rescinded, and all practice inconsistent with the new *Rules* is superseded ; and as to all matters not provided for by the *Rules*, the practice is, as far as may be, to be regulated "by analogy thereto." Whoever expects to find in the new *Rules* a complete code of procedure will, in many respects, find himself disappointed. For instance, by *Rule* 25, for the practice as to issuing orders of course, we are referred to the English practice prior to Trinity Term, 1856. By *Rule* 135, upon a reference in a redemption writ, we are referred to the present practice : if it is desired to appoint a guardian for an infant defendant, when he is not represented by the official guardian, by *Rule* 261 we are referred to the former Common Law practice. By *Rule* 335, we are referred to the former Chancery practice, to learn how an insane person not so found may sue or defend an action. By *Rule* 367, if we want to know in what circumstances a writ may issue to repeal letters patent, etc., we must hunt up the practice in the Court of Chancery in England on 5 Dec., 1859. So, also, the consolidation of actions is by *Rule* 652, made to depend on the practice in the Superior Courts of Law before the Judicature Act. By *Rule* 862, the practice as to enforcing a judgment for the payment of money is regulated by the practice of the Superior Courts before the Judicature Act. By *Rule* 878, writs of attachment against the person may be issued under the same circumstances and in the same manner as they could according to the practice of the Court of Chancery before the Judicature Act, but by the following *Rules* provisions are introduced wholly different from the former Chancery practice in this respect. By the former Chancery practice it was customary to indorse the decree or order sought to be enforced with a special notice to the effect that, if it were not duly obeyed, the disobedient party would be liable to be attached, and upon filing the affidavit of service with an affidavit of non-compliance, the attachment issued without further order. Now, in no case may an attachment issue without an order, to be applied for on notice. In this respect, however, it is only fair to say the consolidation of the *Rules* has merely perpetuated a blunder made in the original Judicature *Rules*.

By *Rule* 1,067, special bail may be put in and perfected "according to the established practice." Then by *Rule* 1,220 the former practice of the Courts of Law and Equity and the Court of Appeal, relating to costs, so far as not inconsistent with the *Rules*, is continued. These references to the former practice are too numerous, and in not a few cases might have been avoided by the framing of rules embodying such parts of the former practice as are thought proper to be retained.

We are disposed to think the arrangement of the new *Rules* is decidedly faulty. Reference to the *Rules* would have been very much facilitated if they had been arranged more nearly in accordance with the ordinary sequence of proceedings in an action. The order of arrangement adopted by the framers of the *Rules*, is very difficult to reconcile with any proper method. For instance: *Rules* 124-137, governing the procedure in some particulars in the Master's office, are grouped together at the beginning of the *Rules* under the head of "Master's Office:" other rules on the like subject are found later, as *Rules* 347-363. Then, some of the *Rules* regulating payment of money into Court, and stop orders, are found under the head of "Accountant's Office" (*Rules* 139-193); and some way after these *Rules*, we come to the *Rules* 224-249, regulating the issue of writs for the commencement of actions; and then later on, under "Miscellaneous Proceedings," we find further *Rules* 632-640, relating to payment of money into Court. Not only is the arrangement of the *Rules* lacking in scientific method, but the printing of the official copy is indifferent, the paper of poor quality, and the number of typographical errors inexcusable.

Having said this much as to the framing of the *Rules*, and the manner in which they have been published, we will proceed to point out a few matters in which we think they might be improved. Some changes which have been made in the wording of *Rule* 30, which defines the jurisdiction of the Master in Chambers, appear to us to have been made without due consideration. In the first part of the *Rule* it is provided that the Master in Chambers is to exercise all such authority and jurisdiction in respect to all actions and matters, including proceedings in the nature of a *quo warranto*, "as by virtue of any statute or custom, or by the rules *of* practice," etc. are now exercised by any judge sitting in Chambers. In the sentence we have quoted the revisers of the *Rules* have incautiously substituted "of" for "or," which materially narrows the operation of the *Rule*. And in the concluding part of this *Rule*, among the matters excluded from the Master in Chambers' jurisdiction, is now included "staying proceedings after verdict *or judgment*." The words "or judgment," which have been added by the revisers of the *Rules*, were, no doubt, intended to refer only to cases where judgment had been pronounced by a judge in court, but the *Rule* as it stands excludes not only such cases, but also cases where judgment has been entered by default.

On referring to the schedule to the *Rules* we find *Chy. Ord.* 610, which provided for the issue of orders for the appointment of guardians *ad litem* to infants, on *præcipe*, is set down as effete, and its provisions have consequently been omitted. This, we think, is a mistake, as the *Rules* do not sufficiently

provide for the appointment of guardians *ad litem* to infants in all cases, the *Rules* as they stand merely providing for cases where infants are required to be served with a writ of summons (*Rule* 258), or an office copy of a judgment (*Rule* 337); but there are a great many other cases in which infants are required to be served with proceedings in which the appointment of a guardian is necessary, and in which the procedure laid down by *Chy. Ord.* 610 proved very convenient, *e.g.*, when notice of motion was desired to be given to an infant for an administration or partition judgment, or in Quieting Title proceedings. In all such cases, and many others of a like character, we suppose it will now be necessary to resort to the former practice of giving notice of motion, and applying in Chambers for the appointment of a guardian. It would have been easy enough to provide that in all civil proceedings against infants, not being for personal torts committed by them, the writ, order, judgment, notice, or other proceedings, required to be served upon an infant, may be served upon the official guardian *ad litem* on such infant's behalf, and upon such service the official guardian *ad litem* shall be *ipso facto* constituted guardian *ad litem* for such infant in such proceedings; but, as we have said, the *Rules* as they at present stand only provide for the two cases we have mentioned.

With regard to the issue of commissions to take evidence abroad, the *Rules* seem defective. *Rule* 586 authorizes the issue of a commission to take the evidence of a party to the action, but there is no express *Rule* authorizing the issue of a commission to take the evidence of a witness. The English *Rule* 487 should have been enacted. The provisions to be found in the English *Rules* 144–153 with regard to proceedings by, or against, paupers ought, we think, also to have found a place in the new *Rules*, but we fail to see that any provision whatever is made for such cases.

In the next place, provision is now made enabling suitors to pay money into court upon requisitions to be obtained from local officers at each county town except L'Orignal, Cayuga and Sault Ste. Marie; at these latter places provision is made by *Rule* 171 for payment to the local officers of money desired to be paid in with a defence, but no provision at all appears to be made for payment of any other money into court at these places. *Rule* 164 provides generally that money to be paid into court is to be paid into the Canadian Bank of Commerce, or at some branch or agency thereof; and the following *Rule* enumerates certain other banks at places where the Bank of Commerce has no branch or agency at which money may be paid in. But *Rule* 163 declares that these *Rules* are not to apply to moneys payable at L'Orignal, Cayuga or Sault Ste. Marie, so that, when money is payable into court at any of the latter places, either for purchase money in case of a sale at any of these places under an order or judgment of the court, or in administration or other suits, the mode of paying it in is left in obscurity. We presume the party desiring to pay money into court at these places could go to the nearest place where money is authorized to be received, and obtain a direction from the local officer and pay the money there, but the *Rules* do not appear to say so.

We were under the impression that the Accountant's office was one in which

the clerks were pretty fully occupied already, but, judging from the voluminous returns required to be made annually by *Rules* 161-162, it would seem that the framers of the *Rules* consider the copying out of the suitors' accounts, running through over thirty large folio ledgers, a little matter which may be safely added to their duties. When the accounts of the Court of Chancery were kept in a pass book, and carried around in the registrar's pocket, such returns might not involve much trouble; but to require them to be made now appears to us to be somewhat absurd, especially as due provision is made for the auditing of the accounts. The returns required to be made by the Clerk of the Process, by *Rule* 16, seem equally useless. These are matters, however, which do not concern the profession.

The diversity of names by which the local officers of the court are known, viz., Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown, we notice, is the cause of some slips in the *Rules*; *e.g.*, *Rule* 18 prescribes that Local Registrars and Deputy Registrars are to perform their duties in like manner as the Clerk of Records and Writs. There is no reason that we can see why Deputy Clerks of the Crown should not also have been included. Then, again, by *Rule* 1,075, provision is made for the transmission of a bail piece and affidavit of justification by the Deputy Clerks of the Crown to the proper officer in Toronto: but the framers of the *Rules* have evidently overlooked the fact that the like duties by Local Registrars and Deputy Registrars should also have been provided for.

We notice that an old common law Rule relating to the shorthand reporters' account has been re-enacted, the framers of the *Rules* apparently being ignorant of the fact that the Shorthand Reporters' Fund has, by an Order in Council, been placed in the care of Mr. Clark, one of the taxing officers, and is now paid into court, an arrangement which, notwithstanding *Rule* 205, we presume, is not intended to be altered.

Rule 214, which relates to the sitting of the judges in vacation, strikes us as a curious piece of composition, which might, very properly, have been the subject of revision, a more involved string of sentences could not well be devised.

Among the changes which the new *Rules* will inaugurate is the extension of the right to specially indorse a writ and recover judgment under what is now *Rule* 80, in cases of ejectment by a landlord against a tenant whose term has expired, or been duly determined by a notice to quit (see *Rules* 245, 739). The English *Rules*, from which this provision is taken, contain a form of special indorsement in such a case, but these *Rules* omit to do so. By *Rule* 705, execution may be issued forthwith on a judgment for default of appearance to a specialy indorsed writ, without awaiting eight days as formerly.

Rule 275, which regulates the time for appearance, prescribes ten days after service, if service is effected within Ontario elsewhere than in the Districts of Algoma or Thunder Bay; and if service be effected in the latter places thirty days for appearance is allowed in ejectment, and twenty days in other actions, with ten days additional in each case when service is effected between 1st November and 30th June. It appears to us that this *Rule* ignores the fact that other

judicial districts have been set off since 47 Vict. c. 14, was passed, and that there are now local offices of the court established in Thunder Bay and Algoma. The time for appearance, we think, should have been regulated not merely by reference to the place of service, but also by reference to the place where the appearance is required to be entered. For example, it seems unreasonable to allow a man served in Thunder Bay, whose appearance is to be entered in Thunder Bay, forty days, or four times as long as he would be allowed if served in Toronto; and it does not seem reasonable that a longer time should be allowed for appearance where service is effected in Thunder Bay than is allowed where service is effected, say in Rainy River District.

In *Rule* 271, which provides in what cases action may be brought in the High Court against persons resident out of the jurisdiction, the revisers have followed the English *Rules* of 1883, instead of the present Ontario *Rule* 45, and the provision in the present Ontario *Rule* 45*e*, to the effect that an action may be brought against a person out of the jurisdiction when he has assets of the value of at least $200 within the jurisdiction, which may be rendered liable in the event of the plaintiff recovering judgment in the action, has been omitted. This, we think, is a serious mistake.

By *Rule* 299, when a notice disputing a claim is filed in a mortgage action, a motion for judgment will hereafter be necessary, whereas under the present *Rules*, according to the decision in *Trust and Loan Co.* v. *McCarthy*, 19 C. L. J. 188, judgment might in such a case be obtained on *præcipe*. It may be doubted whether the change effected by *Rule* 299 is any improvement. Under the former practice in Chancery a defendant simply filing a note disputing the amount claimed, was entitled to four days' notice of the taking of the account. This provision does not appear to be preserved in the new *Rules*—such a defendant would appear to be now entitled to the ordinary notice, but what is to be "the ordinary notice" does not appear.

Under the new *Rules*, all judgments delivered at places elsewhere than Toronto are to be settled "when necessary" by the Deputy Registrar, Deputy Clerk, or Local Registrar, at the places of trial, subject to the right of either party to apply on notice to one of the judgment clerks, or to the judge, to vary the minutes. As many of the local officers have unfortunately had no legal training, and have had no experience in equity practice, the duty which is thus cast upon them is one that we fear they will not, as a rule, be very competent to perform satisfactorily. The sole merit of the procedure prescribed by *Rule* 761, if merit it can be called, is that it will probably increase costs.

It was much to be desired that some uniform rule should be laid down as to the entry of orders. While in the Chancery Division it has been customary to enter all orders made in court in full, in the other Divisions, no court orders are entered at all. The consequence will be that in the investigation of titles depending on such unentered orders, in the event of their loss or destruction, not a little difficulty is likely hereafter to arise. While the practice in the Chancery Division has been perhaps too strict, the practice in the other Divisions has undoubtedly been too lax; and it would have been well if some *Rule* had pre-

scribed the class of court orders which should be entered in full in all the Divisions. This, we regret to say, has not been done. *Rules* 546, 773, 774, do not cover the ground.

The filing of reports of Local Masters is regulated by *Rule* 84. The reports of Local Masters are to be filed in their own offices, but may at the request of any party be forwarded to the Clerk of Records and Writs; in other cases a report is to be filed in the proper office of the Division at Toronto. Reports are to become absolute at the expiration of fourteen days from their filing, unless notice of appeal is served within that time (*Rule* 848); and appeals from reports are no longer to be heard in chambers, but are in all cases to be brought on in court. The notice of appeal is to be seven days' notice, and is to be returnable within a month from the date of the report, and is to be set down for argument before a judge in court for the day on which the motion is returnable (*Rules* 849, 850).

Rule 892, which relates to the amounts to be indorsed on writs of execution for the costs of writs, appears to be defective. It states that it shall be the duty of the officer issuing the writ to indorse the amounts "hereinafter mentioned," but, unfortunately, no amounts whatever are thereinafter mentioned.

One of the worst instances of the typographical blundering to which we have referred is to be found in *Rule* 1020, which, as printed, is simply nonsense. It reads as follows:—

"The Local Master shall be entitled to confer or correspond Act time to time with the Inspector of Titles, for advice and assistancfrom questions of practice or evidence, or other questions arising under the one or under these *Rules*."

By *Rules* 1038-1044, the procedure with regard to contested municipal elections is simplified. Writs of *capias ad respondendum* are abolished by *Rule* 1045, and an order for arrest substituted. We are not, however, quite clear that the provision as to the issue of concurrent orders is sufficient to authorize such orders being addressed to different sheriffs from the one named in the original order.

The *Rules* relating to *bailable proceedings* appear to us to be sadly defective. If there be any branch of practice more than another which needs simplification and codification it is this, and yet these *Rules* leave the practice in about as incomprehensible a condition as it was before.

Writs of replevin, *mandamus*, prohibition and *certiorari* have been abolished, and orders substituted. The *Rules* 1141-1169, relating to interpleader applications appear to be well framed.

With regard to the vacations, some changes have been made. Since the Judicature Act came into force, the long vacation has included the 1st September, but this day has now been excluded. Formerly the Christmas vacation was excluded in the computation of time, for filing or amending pleadings, for setting down demurrers, appealing from reports, moving to discharge orders of revivor, moving to set aside a judgment by a party served therewith, or taking proceedings in appeal; but hereafter, as we read *Rule* 484, only the long vacation is excluded from the time allowed for the foregoing proceedings, so that Christmas vacation is to a great extent blotted out.

With regard to the sittings of the court for the transaction of the weekly business, provision is made for holding one weekly court for all the Divisions, on Tuesday, Wednesday and Friday—Monday and Thursday being devoted to judges' chambers, and Saturday being an off-day. But it seems to be doubtful whether these particular *Rules* will go into operation in September. In the event of their going into force, all motions, except those that are *ex parte*, are to be set down with the Clerk of Records and Writs (*Rule* 541), and also all chamber appeals (*Rule* 545).

Summonses to show cause, and rules *nisi*, we are glad to see, are abolished, and the procedure by notice of motion substituted in all cases (*Rule* 526). It has also been made clear that *ex parte* orders may be rescinded without appeal.

In *Rule* 616, we think a slip has been made by omitting to provide within what time affidavits in answer to a motion are to be filed, as did the Chancery Order 261, from which *Rule* 616 is adapted.

We believe we have now touched upon the principal changes effected by the Consolidated *Rules*, and from what has been said, it will be seen that they are neither very numerous nor important; at the same time the consolidation is anything but perfect, and will, we think, need revision before the *Rules* can be considered satisfactory as a code of practice.

Reviews and Notices of Books.

The Statute Criminal Law of the Dominion of Canada, relating to Indictable Offences, with full text as revised in 1886, *and put into force by Royal Proclamation on the 1st day of March*, 1887, *and Cases, Notes, Commentaries, Forms, etc., etc.* By HENRI ELZEAR TASCHEREAU, one of the Judges of the Supreme Court of Canada. Second Edition, re-arranged and enlarged. Toronto: Carswell & Co., Law Publishers. 1888.

As stated by the learned author in his preface to this second edition, the passing into law by Royal Proclamation on March 1st last, of the Revised Statutes of Canada rendered necessary the publication of a new edition adapting the references, notes, commentaries and forms contained in the previous edition to the sections of the criminal statutes to which they respectively apply, as they now appear in the Revised Statutes. The English Crown cases are brought down to the latest date, and to these have been added a large number of cases from all the Provinces of the Dominion, principally selected from those determined since the Criminal Statute Law was made uniform throughout the Dominion in 1869. Over 800 new cases are referred to in this edition. An important addition to the work, and one which greatly enhances its value, are the manuscript notes of Mr. Greaves on various subjects which that eminent writer gave to Judge Taschereau to be used in connection with this edition of his work. This volume also contains a number of statutes with full notes, not comprised in the first edition.

The editor informs us in his preface that it was intended to give a still wider scope to the work by including the penal clauses comprised in the Customs Act, England Revenue Act, Indian Act, Government Railway Act, Trademarks Act, Postal Service Act, the Banking Act, Wrecks and Salvage Act, with others, but this would have added largely to the volume of the work, and would not have been of sufficient general interest to warrant the expense of publication. The suggestion has been made that the Federal Government should assist the learned editor in an undertaking of this kind, and we gladly endorse this suggestion. There are many holding public positions to whom such a book would be a great boon, and the working of the various departments covered by these enactments would be very materially benefited. Book-making in the legal line is not remunerative in this country, giving very little for valuable time spent, and such a work as that proposed would be money out of pocket to anyone undertaking it.

The work before us is a valuable compendium of criminal law. It contains a mass of information collected with the greatest care from a number of sources, English, American and original. For example, we notice, in addition to the manuscript notes of Mr. Greaves, some notes by our old friend Mr. G. W. Wicksteed, who also has a thorough familiarty with the subject of Canadian Criminal Law. The cases cited, and information given, are placed under the appropriate sections of the various Acts, with full references to analogous sections. We doubt not this book will be appreciated not only in Canada, where it is necessarily of most value, but also in England and the United States. Whenever the author has found it necessary to express his own views on any point, or to criticise enactments or authorities, he lays down his propositions with clearness, and treats them in a way which shows him to be master of his subject. The country is under a debt of gratitude to Mr. Justice Taschereau for his most successful effort to clear up difficulties in this most important branch of the law, and to lay before those concerned in its administration a clear, accurate and intelligent review of the provisions coming within the scope of the work.

We are glad to see one of our judges devoting himself thus to legal literature. Speaking generally, they have not much time for such work. Their brethren in England, however, are not only not unknown in this field, but occupy a foremost position therein. We are glad that Mr. Justice Taschereau has set the example in this country, and we trust others competent to do so will follow it.

Lindley on Partnership. Vol. I. Blackstone Publishing Co., Philadelphia.

This is the last issue of the text-book series of the Blackstone Publishing Company of Philadelphia. It is reprinted from the fifth English edition. The learned editor is assisted in this edition by William C. Gull, Esq., and Walter B. Lindley, Esq., and American notes are added by Charles Y. Avdenried. These notes add largely to the value of the book in this country. We would again call the attention of those of our readers who have not yet subscribed thereto to this series of law books. The price is nominal—only $15 a year. The selection is admirable, and taken from the latest editions of the various works republished.

Proceedings of Law Societies.

THE LAW SOCIETY OF UPPER CANADA.

RESUME OF PROCEEDINGS.

SPECIAL meeting of Convocation called to consider the report of the Committee on the Law Faculty.

Saturday, 14th April, 1888.

Present—Sir Adam Wilson, and Messrs. S. H. Blake, Bruce, Ferguson, Foy, Hoskin, Irving, Lash, McCarthy, Mackelcan, Maclennan, Martin, Meredith, Morris, Moss, Murray, Osler, Purdom, Robinson, Shepley and Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

Mr. Moss, on behalf of the Committee appointed by Convocation, to consider and report on the question of the establishment and maintenance of a Law Faculty, presented a report, dated 29th March last.

The said report was then laid before Convocation.

A letter was also read from the Hamilton Law Association, enclosing a resolution passed on 10th April, 1888.

Mr. Moss moved the adoption of the report, seconded by Mr. Lash.

The report is in the following words:—

REPORT OF THE LAW FACULTY.

To the Benchers of the Law Society:

The Committee on the Establishment and Maintenance of a Law Faculty, appointed by resolution of Convocation on the seventeenth of February last, beg to report as follows:—

1. The Committee have considered further the matters before, and by the resolution of the seventeenth of February last, referred to them, and, as directed by Convocation, they caused to be forwarded to the authorities of each of the Universities in the Province of Ontario, a copy of the report of the Joint Committee of the Law Society and the University of Toronto, and requested from the Universities suggestions in writing upon the matters before the Committee.

2. In response to such request, the Committee received suggestions from the authorities of the following Universities, viz.: Queen's College, Kingston; Trinity College, Toronto; College of Ottawa, Ottawa; and their communications are appended hereto.

3. The Committee also, as directed by Convocation, requested the presence of representatives of the Universities at a meeting held on the seventeenth instant, and in response to such invitation, the following representatives of Universities were present, viz.: Dr. Watson, representing Queen's College; Provost Body, representing Trinity College; Wm. Kerr, Q.C., representing Victoria College; W. M. Clarke, Esq., representing University of Toronto.

A prolonged discussion upon the subject of the scheme reported by the Joint Committee, and the objections thereto suggested by the appended communications, took place, in the course of which the representatives of Queen's and Trinity, in response to an inquiry as to whether, in the event of Convocation seeing fit

to modify the scheme of the Joint Committee so as to include the suggested changes, their respective Universities would come in under the arrangement, stated their inability to pledge their Universities to such a course.

4. The Committee further report that they are informed by the Secretary that he did as directed by Convocation, transmit to every County Law Association a copy of the report of the Joint Committee, and of the resolution of Convocation of the seventeenth of February last, with a request that the same be brought to the notice of the members of the Association, and that in response he has received the appended communication from the Law Association of Frontenac, but no other.

5. The Committee do not deem it necessary to make any further suggestions.

All of which is respectfully submitted.

(Signed) CHARLES MOSS, *Chairman.*

March 29, 1888.

APPENDIX.

COMMUNICATION FROM QUEEN'S COLLEGE.

Queen's University, Kingston, Canada, March 10th, 1888.

J. H. Esten, Esq., *Secretary, Law Society of Upper Canada:*

SIR,—I received yours of the 22nd ult., enclosing report on the establishment of a Law Faculty under the joint management of the Law Society and the University of Toronto, and requesting me as Principal of Queen's College and University to make suggestions on the report.

Permit me to observe: First, that having looked over the scheme proposed, I find that nothing is said regarding the object to be gained by the innovation, and that nothing is said regarding the nature or extent of the examinations which candidates must pass. For example, the Preliminary Examination may mean the present Junior Matriculation, or Senior Matriculation, or it may mean something less than the Junior or more than the Senior. It is, therefore, difficult to offer criticisms. I would respectfully ask for more light. Secondly, as the terms of the proposal are to form the basis of an alliance between the Law Society and any University in Ontario, I submit, that if such alliance be thought desirable, the basis be considered by a joint committee, representing the Law Society and the Universities. To such joint committee Queen's would doubtless send a representative. The action of the Society in sending me the report for suggestions indicates that this is its view.

So much *in limine.* Coming to the merits of the question, I would simply ask: (1) Is it wise to shorten the time now required from candidates for the profession of law? The great mass of candidates will always prefer a short course, no matter how bad it may be. If a man can get a University Degree and the Degree of Barrister-at-Law, and admission as a Solicitor in four years, how many will take the present course of seven years? Can a man be as well prepared for any profession in four years as in seven? (2) Why should the Law Society and any University aim at a concurrent Academic and Professional course? The Law Society can best assist a University by requiring university standing from candidates, or by giving the present or even more encouragement to take the Degree of B.A. A University can best assist the Law Society by giving the most complete culture to those who intend to be candidates for the legal profession. Let each do its utmost to make improvements in its own department. I have the honor to be, Sir,

Your obedient servant,

(Signed) GEORGE M. GRANT, *Principal.*

COMMUNICATION FROM TRINITY COLLEGE.

Memorandum on the proposed scheme for the establishment and maintenance of a Law Faculty.

The Corporation of Trinity University have given careful consideration to the scheme for the establishment of a Law Faculty, submitted to them by the Law Society, and are of opinion that the scheme in its present form, is likely to seriously injure the Arts departments of the various Universities, and also to lower the general standard of education of members of the legal profession.

The reasons which have led them to this conclusion, are the following, viz.:

1. Whilst experience has shown that the shortening of the time of legal study for Graduates in Arts from five years to three, has always induced a considerable number of candidates to acquire the liberal education requisite for a B.A. degree, whether in Pass or Honors, before beginning their professional studies, the proposed plan of admitting to the degree of LL.B. and Barrister-at-Law, after four years passed in professional studies only, will largely remove the inducements hitherto held out to candidates to obtain this more liberal education, and will seriously diminish the number of such candidates. It is to be feared that the advantages of a B.A. degree over that of LL.B., will not be sufficiently appreciated by the mass of students, to induce them to spend two additional years in obtaining it, and thus damage will be done to the Arts departments of the Universities, and to the interests of Higher Education.

2. A further disadvantage under which Graduates in Arts will be placed by the new scheme is that they will be deprived of the present complete course of law lectures extending over their three years of legal study, and will receive only a partial course of two years on subjects not treated of in the lectures of the University of Toronto, although it seems doubtful whether, under the scheme, even the partial course will be open to such graduates or to any students not proceeding under the scheme.

3. Futher, this proposed scheme will, in the opinion of the Corporation, seriously affect the work of the Law Faculty of this University, which is intended to encourage among Students-at-Law and Barristers, a course of reading of a wider, and less purely professional character, than that required for the Degree of Barrister-at-Law. A consideration of the Curriculum for B.C.L., in this University, will show that in addition to subjects of a purely professional character, candidates are required to study such subjects as Civil Law, its history and development; International Law, Political Economy, Parliamentary Government, and Constitutional History and Law. According to our present regulations candidates cannot be admitted to the Degree of B.C.L. under the age of twenty-three years, unless they are Graduates in Arts. In our opinion a great mistake would be made in discouraging this course of study of three years, and substituting in its place a course of lectures on some of these subjects extending over two years only, to be given for the most part to boys just fresh from school, of undeveloped powers of mind, and incapable of properly appreciating such subjects or assimilating such instruction. Whilst the corporation entertains these strong objections to the whole scheme as proposed, should it be approved of in principle by the Law Society, they are of opinion that it might be greatly amended by the following changes:

1. That the term of two years of legal study at Osgoode Hall should be extended to three years, thus placing it more nearly on a par with that required from Graduates in Arts.

2. That provision should be made for supplying Students-at-Law who are Graduates in Arts, as well as other Students-at-Law, with a complete course of legal lectures, such as is now furnished by the Law Society.

3. That it should be clearly provided that the two years spent at a University under the proposed scheme, should be spent in the Faculty of Law alone.

4. That the provision of the new scheme should be made applicable to any University in Ontario, without necessitating any further legislation on the part of the Law Society.

The Corporation beg to submit herewith a list of amendments to the wording of the scheme sent to them, which will have the effect of introducing into it the suggested changes:

Proposed amendments to Report, suggested by Trinity College, according to numbered paragraphs.

1. After "Upper Canada," omit "and the University of Toronto," and add "and such Universities of Ontario as shall be willing to enter into this scheme."

2. For "the Senate of the University," substitute "the Governing Bodies of the several Universities."

3. For "four," read "five."

4. For "the University," read "each University;" after the "third," omit "and," and after "fourth," read "and fifth."

5. For "this University," read "the Universities."

6. For "four," read "five."

7. Before the word "University," substitute "their" for "the," and add after "University," "in the Faculty of the Law."

8. For "the University," read "his University."

9. After the word "third," omit "and," and after "fourth," add "and fifth."

10. For "four," read "five," for "the University," read "his University;" after "LL.B." add "or B.C.L.," for "to the University," read "to that University," for "as the University," read "as the said University."

12. After "LL.B.," add "or B.C.L.," instead of "two," read "three."

13. Before "University," substitute "each" for "the."

14. For "the University Senate," substitute "the Governing Body of each University."

15. Omit all the words from "Composed of," to "annually," and read instead "Members, one to be chosen by each University, and the remainder by the Law Society, so that the number appointed by the Law Society shall always be one greater than the number appointed by the Universities."

17. After "Fitness," add "or with the present provision for lectures open to all Students of Osgoode Hall."

18. Omit 18.

COMMUNICATION FROM COLLEGE OF OTTAWA.

College of Ottawa, Ottawa, March 13th, 1888.

To the Secretary of the Law Society of Upper Canada:

SIR,—Your letter of February 22nd, and the enclosed scheme, have been duly communicated to the Senate of the University College of Ottawa, at its meeting of March 12th, and I have been instructed to send you in answer the following copy of a Resolution adopted by said Senate at the above-mentioned meeting:

Resolved, that the Senate of the University College of Ottawa, after having considered and examined a scheme for the establishment and maintenance of a Law Faculty, submitted by the Joint Committee of the Law Society of Upper Canada and the Senate of the University of Toronto, is of opinion that the said scheme as exposed is conducive to the advancement of the study of Law in

our Province, and that it contains nothing objectionable to the rights and privileges of other Universities. Provided that the same advantages now granted to the University of Toronto be virtually secured to any other University wishing for the same.

Resolved, also, that the said Senate of the University of Ottawa hereby claim the right of entering into a similar scheme with the Law Society of Upper Canada as soon as said University shall have organized its Law course.

Thanking you for your communication, and hoping that you will kindly inform us of any proceedings in this matter,

I am, Sir, yours respectfully,

(Signed) C. F. MARSON, O.M.J.,

Secretary of the Senate of U. C. of Ottawa.

COMMUNICATION FROM LAW ASSOCIATION OF FRONTENAC.

Kingston, March 15th, 1888.

At a meeting of the Bar Association, held in the office of Dr. Henderson, Q.C., the following resolutions were passed :—

Moved by James Agnew, seconded by R. V. Rogers, and

Resolved, "That the Bar Association of the county of Frontenac, having carefully considered the scheme of Legal Education, submitted by the Law Society, hold that it is wrong in principle, and not calculated to benefit the profession." Carried.

Moved by E. H. Smythe, LL.D., seconded by G. M. Macdonnell, Q.C., and

Resolved, "That while we object to any union of the Law Society with any other teaching faculty, we consider that if such a scheme is entered into, common justice demands that the same privileges shall be granted to all the Universities in Ontario." Carried.

Moved by R. W. Shannon, seconded by J. M. Machar, and

Resolved, "That no shortening of the time required to be spent by students or articled clerks before being called to the Bar or admitted to practise should be allowed, except where the Degree of Bachelor of Arts has been taken previously to entry into the Law Society." Carried.

(Signed) R. W. SHANNON, *Secretary.*

Ordered, that the whole question of Legal Education be referred to a Special Committee to report to Convocation at as early a day as practicable, and that the further consideration of the report of the Committee on a scheme for the establishment and maintenance of a Law Faculty, be deferred until after the Committee appointed by this resolution shall have made its report; the Committee to be asked to consider the present scheme and any other which may be presented, as well as the following :—

1. Whether or not, it is desirable to enter into any arrangement with any University for the joint education of students.

2. Whether or not, it is desirable in any such scheme to shorten in any way the period of study or service of students.

3. And whether or not, it is desirable that the Law Society should aid in establishing branches of the Law School in other centres than Toronto, by lectures to be delivered, either under the direction of Local Bar Associations, or of any University domiciled in such centre, the attendance on such lectures where established to be compulsory.

The Committee to be instructed to request the presence of a representative of each County Law Association at its meetings, to confer with the Committee on the matters referred to them.

Ordered, that the following gentlemen be a Special Committee in accordance with the previous resolution, namely: The Hon. Sir Adam Wilson, Messrs. Moss, S. H. Blake, Irving, Mackelcan, Robinson, McCarthy, Osler, Bruce, Meredith, Maclennan, Murray, Hardy, Foy, Lash, Martin, Shepley, Purdom, Britton, Hudspeth and Fraser; of whom five shall form a quorum.

Convocation adjourned.

EASTER TERM, 1888.

THE following is a *résumé* of the proceedings of Convocation during Easter Term, 1888:—

The following gentlemen were called to the Bar during the above Term, *viz.*:—

May 21st.—John Gumaer Holmes, Arthur Stevenson, Robert Alexander Grant, Edward Albert Crease, Charles Horgan, James Richard Code, Archie Foster May, William Halloway Wallbridge, Gordon Hunter, Robert Richard Hall, William Carson Pettigrew McGovern, Ernest Solomon Wigle, Robert Maxwell Dennistoun, William Wallace Jones, Joseph Missett Musson, John Franklin Wills, Charles Howard Widdifield.

May 26th.—Robert Kimball Orr.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz.*:—

May 21st.—C. Horgan, J. R. Code, W. N. Irwin, J. F. Wills, W. S. B. Hall, C. R. Hanning, W. E. Hastings, J. E. Hansford (who passed his examination in Hilary Term last).

May 26th.—A. M. C. Steel, R. A. Grant, D. L. Sinclair, G. Hunter, R. R. Bruce.

June 1st.—T. J. Blain, E. D. Cameron.

The following gentlemen passed the Second Intermediate Examination, *viz.*:—

T. J. Mulvey, A. G. Browning, G. W. Bruce, J. G. Kerr, W. A. Skeans, A. G. Farrell, F. J. Travers, T. A. Rowan, J. H. Sinclair, F. C. Hastings, R. L. Gosnell, G. S. McCarter, W. A. Smith, A. Henderson, R. Baldwin, D. T. K. McEwan, J. T. Hewitt, W. H. Irving, D. M. Robertson, C. Swabey, D. S. Wallbridge, M. O. Johnston, A. I. McDonell.

The following gentlemen passed the First Intermediate Examination, *viz.*:—

N. W. Rowell, with honours and first scholarship; E. B. Ryckman, with honours and second scholarship; W. H. Murray, with honours and third scholarship; W. A. Logie and T. D. Law, with honours; and W, J. Fleury, A. J. Keeler, C.W. Kerr, J. W. McColl, J. Reeve, N. McKenzie, T. J. Murphy, R. A. Montgomery, E. Bayley, C. J. Notter, A. G. Smith, H. W. Stewart, F. J. Roche, D. Grant, H. Chatelain, G. T. Falkiner, F. F. Pardee, A. Abbott, H. L. Drayton, W. S. Buell, J. W. Morrice, E. H. Harper, J. D. Lamont, R. G. Pegley, J. J. Maclennan, W. W. Scane, J. R. L. Starr, J. F. Macdonald, D. Fenton, A. J. F. Sullivan, J. H.

McGhie, D. J. Macmurchy, H. J. Minhinnick, J. A. McMullen, M. R. Allison, F. W. Hill, J. J. Hughes, L. Irving, J. F. Lennox, W. Mills, E. W. McIntyre, C. E. Oles.

The following gentlemen were admitted as Students-at-Law, *viz.*:—

Graduates.—May 3rd.—Christopher Lewis Crassweller, Robert Benjamin Henderson, James Hales, Harry Darling Leaske and Edwin Pirie.

June 23rd.—Thomas O'Hagan, Lindley H. Bowerman, Angus Urquhart Bain, Edward Francis Blake, Horatio Clarence Boultbee, Norman Phelps Buckingham, Thomas Alexander Gibson, Thomas Milne Harrison, Thomas Milton Higgins, William Frederick Hull, James Edmund Jones, Samuel King, Henry Langford, Robert McKay, Edward Mortimer, Gordon Waldron and George Wilkie.

Matriculants.—John Henry Coburn, Herbert Lennox, Robert Lincoln Reid.

Juniors.—George Frederick Blair, Charles Lester Mills, William Carney, Henry Jasper Martin, John Bacon Irwin, Merritt Alphæus Brown, Thomas Cranston Gordon, William Thomas Joseph Lee, Edward Donald, James William Lewis, Charles Tyrell Sutherland, Hugh Alexander Stewart, Adam Francis Hirst Mills, Frederick William Gladman, William Bledon Bentley,

Monday, 21st May.

Convocation met.

Present—Sir Adam Wilson and Messrs. Beaty, Foy, Hoskin, Irving, Kerr, McMichael, Martin, Meredith, Moss, Murray, Osler and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

Mr. Moss presented the report of the Legal Education Committee on the case of Charles Elliott, recommending that he be allowed his First Intermediate Examination as an articled clerk as of this Term; the allowance not to be taken as any recognition of his service under articles to Mr. O'Connor.

On the case of F. H. Keefer, recommending that he should either comply with or get rid of the order of Convocation of 6th September, 1884.

On the case of F. B. Fetherstonhaugh, reporting that as Mr. Fetherstonhaugh is not yet a barrister, it is premature to deal with his application.

On the case of J. I. Poole, recommending that he be allowed to present himself next Term, for an oral examination at the same time as the candidates for the Second Intermediate Examination.

The report was received, considered, adopted, and it was ordered accordingly.

Mr. Shepley gave notice that, at the next regular meeting of Convocation, he would move a resolution with reference to the insufficiency of the provision made in the Provincial Court Rooms at Osgoode Hall for Members of the Outer Bar, in the matter of desk or table accommodation.

Ordered that the notice stand for the 26th instant.

The petitions of Messrs. Bain, Bowerman and O'Hagan were read.

Ordered that the above-named gentlemen, all being graduates, be permitted to give four weeks' notice prior to the 26th June, when their cases will be dealt with by the Legal Education Committee.

The complaint of Miss Jemetta Craine against a solicitor was read.

Ordered that it be referred to the Committee on Discipline.

Ordered that the letter of Mr. A. Clark, of Harwick, be returned to him.

The complaint of Mr. J. A. Macdonell, of 1st March, 1888, the writ of summons, of 10th May, against the Law Society and Mr. S. H. Blake, and the letter of Mr. S. H. Blake to the chairman, dated 12th May, were read.

Mr. Murray, from the Finance Committee, read a report on the subject of the suit of Macdonell against the Law Society and Mr. S. H. Blake, which was adopted.

The Secretary read a complaint from Mr. J. A. Macdonell in reference to the noise in the Library, which was referred to the Library Committee.

A letter from R. J. Wicksteed, of Ottawa, dated 6th March, 1888, was read.

A letter from D. F. McArdle, of Listowell, dated 17th March, 1888, was read.

Ordered that a certificate be issued that he was duly called to the Bar on all arrears of fees being paid.

The Secretary read the report on the Law School for the season of 1887-1888.

Consideration of the report was deferred until the 26th instant.

Tuesday, 22nd May.

Convocation met.

Present—Messrs. S. H. Blake, Bruce, Ferguson, Guthrie, Irving, McCarthy Martin, Moss, Osler and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

The petition of George Wilkie was read.

Ordered that he be permitted to give four weeks' notice prior to the 26th June next, when his case will be dealt with by the Legal Education Committee.

Convocation adjourned until 12.30 p.m. to-day.

Convocation assembled at said hour.

Mr. Martin, from the Committee on Aid to County Libraries, presented a report, which was read, received, considered and adopted.

Ordered that the several sums of money recommended by the report adopted this day, be paid to the various Law Associations, viz. :—

To the County of York	Association	.....	$145 00
" "	Carleton "	.....	400 00
" "	Hamilton "	.....	1000 00

The petition of F. H. Keefer, of 21st May, was received, read, and referred to the Legal Education Committee for report.

The Secretary drew the attention of Convocation to an inaccuracy contained in the report of the Examiners relating to the examination of R. R. Bruce, for Certificate of Fitness.

The Secretary was directed to call on the Examiners for a supplementary report forthwith.

Saturday, 26th May.

Convocation met.

Present—Messrs. Britton, Hardy, Hoskin, Irving, Kerr, McCarthy, Martin, Morris, Moss, Murray, Osler and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

Moved by Mr. Martin, seconded by Mr. Hoskin,

That Mr. Edward Blake, Q.C., M.P., be re-elected Treasurer of the Law Society of Upper Canada. Carried.

Mr. Moss, from the Legal Education Committee, presented a report,

In the case of A. M. C. Steele, that his service be allowed, and recommending that his Certificate of Fitness be granted; and in the case of R. A. Grant, recommending that the filing of his articles be allowed, and that his Certificate of Fitness be granted.

The report was received and adopted, and it was ordered accordingly.

The Committee further reported in the case of F. H. Keefer, that the Committee do not see any ground for changing the order made on the 6th September, 1884.

The report was adopted.

The petition of H. I. Lyon was read.

Ordered that under rules now in force Convocation is unable to grant the petition.

The Secretary presented the report of the Examiners in the case of R. R. Bruce.

Ordered that Mr. Bruce be granted a Certificate of Fitness.

On motion of Mr. Martin, seconded by Mr. Moss, it was

Ordered that the Standing Committees for the current year be as follows, viz.:—

STANDING COMMITTEES FOR 1888.

Finance.—Messrs. S. H. Blake, Sir Adam Wilson, J. J. Foy, Æ. Irving, Z. A. Lash, E. Martin, T. H. Purdom, L. W. Smith; H. W. M. Murray, *Chairman.*

Library.—Messrs. G. F. Shepley, S. H. Blake, H. Cameron, J. H. Ferguson, D. McMichael, J. H. Morris, Charles Moss, C. Robinson; Æ. Irving, *Chairman.*

Reporting.—Messrs. B. M. Britton, H. Cameron, G. F. Shepley, F. Mackelcan, E. Martin, D. McCarthy, H. W. M. Murray, B. B. Osler; J. Maclennan, *Chairman.*

Legal Education.—Messrs. J. H. Ferguson, J. Hoskin, Z. A. Lash, F. Mackelcan, W. R. Meredith, J. H. Morris. B. B. Osler, C. Robinson; Charles Moss, *Chairman.*

Discipline.—Messrs. A. Hudspeth, J. K. Kerr, F. Mackelcan, J. Maclennan, D. McMichael, A. Bruce, C. Robinson, L. W. Smith; J. Hoskin, *Chairman.*

Journals and Printing.—Messrs. J. Beatty, B. M. Britton, J. J. Foy, C. F. Fraser, J. Hoskin, D. McCarthy, Charles Moss, T. B. Pardee; J. K. Kerr, *Chairman.*

County Libraries Aid.—Messrs. B. M. Britton, B. B. Osler, D. Guthrie, A. S. Hardy, A. Hudspeth, J. K. Kerr, W. R. Meredith, A. Bruce; E. Martin, *Chairman.*

Mr. Shepley's motion (notice of which was given on the 21st instant) was carried.

Mr. Kerr, from the Committee on Journals and Printing, reported in the case of Mr. John Bell, Q.C., that his seat as a Bencher had not become vacant.

The Secretary was ordered to write to the Solicitor and state in relation to the action brought by Mr. J. A. Macdonell against the Society, questioning the right of Mr. S. H. Blake to sit as a Bencher *ex-officio*, that Convocation desires that steps be taken at once to have the same brought before the court by special case, and that the counsel retained by the Society be consulted with that view.

Friday, 1st June.

Convocation met.

Present—Messrs. Bruce, Foy, Fraser, Guthrie, Hardy, Irving, McMichael, Mackelcan, Murray and Osler.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

Mr. Mackelcan from the Discipline Committee, reported on the complaint of Miss Jemetta Craine, that a *prima facie* case had been made out, and recommended an investigation.

Ordered that the Report be adopted, and that the complaint be referred to the Discipline Committee for investigation and report.

A letter was read from A. G. Browning, dated 28th May, 1888, explaining his non-attendance at the Honour Examination held on the 26th May last. Also a letter from J. G. Kerr, of Chatham, dated 30th May, 1888, who had attended the examination of 26th May, asking for his travelling expenses, amounting to ten dollars, he having attended the Honour Examination on the 12th May as well as that of the 26th May.

Ordered that the subject of the two letters above mentioned do stand for consideration until the next meeting of Convocation, and that the Secretary, in the meantime, do enquire whether all of the Honour men will be able to attend on the 25th August next, at the examination for honours of the second intermediate of next term.

A letter was read from Mr. Walter Read, dated 29th May last, on the subject of the suit of *Macdonell* v. *The Law Society*.

Saturday, 9th June.

Convocation met.

Present—Messrs. Bruce, Hoskin, Irving, Kerr, Lash, McMichael, Martin, Morris, Moss, Murray, Robinson, Shepley and Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

Mr. Moss, from the Special Committee, to whom was referred the question of Honours and Scholarships, presented the report of the Committee, which was read, received and adopted.

Ordered that Messrs. N. W. Rowell, E. B. Ryckman, W. H. Murray, W. A. Logie and T. D. Law be awarded Honours in connection with the first Inter-

mediate Examination and that Mr. Rowell receive a scholarship of one hundred dollars, Mr. Ryckman a scholarship of sixty dollars and Mr. Murray a scholarship of forty dollars.

Mr. Martin, from the Special Committee on Legal Education, presented a report as follows :—

REPORT OF SPECIAL COMMITTEE ON LEGAL EDUCATION AND LAW SCHOOL.

To the Benchers of the Law Society of Upper Canada :

The Special Committee, appointed under the Resolution of Convocation passed on 14th April last, beg leave to report,

That they have held several meetings and considered the questions referred to them, and have attached hereto copies of the resolutions passed at the meetings, which are submitted for the consideration of Convocation.

All of which is respectfully submitted.

(Signed) EDWARD MARTIN, *Chairman.*

Osgoode Hall, Toronto, June 6th, 1888.

The Secretary read the minutes of all the meetings of this Committee.

Ordered that leave be given to the Committee to sit again, and that they be requested to report.

Convocation does not at present deem it necessary that a Committee should visit the other law schools.

Mr. Moss introduced a rule as follows : That the Law School be continued for a period of one year, subject to be discontinued during that period, upon the creation of a Teaching Faculty, and that the present lecturers be also continued on the same terms.

The rule was read a first and second time.

The ordinary rule as to a third reading was unanimously dispensed with, and the rule was read a third time and passed.

Mr. Kerr, from the Committee on Journals and Printing, presented a report recommending certain changes in the Standing Orders of Convocation.

The report was received, read and adopted.

Mr. Kerr then introduced the following Rule, founded on the report.

Rule to amend the Standing Orders of Convocation, Rules 3 to 9, section xxi., page 62 of the Consolidated Rules.

Rules 3, 4, 5, 6 and 7 shall be amended so as to read as follows :—

"3. The Sub-Treasurer shall, during the term of his office, safely keep the rolls and archives of the Society.

"4. The Treasurer shall keep the custody of the seal of the Society, and personally, or by the Sub-Treasurer, hand over the same to his successor.

"5. No alteration or addition shall be made in or upon the rolls of the Society, except under the authority of Convocation.

"6. At the close of every Term the entries to be made on the rolls in consequence of the admissions, calls, elections or appointments or orders of Covocation during the Term, shall be thereupon made by the Sub-Treasurer in the

paper roll and the index shall be continued, and the paper roll and index shall thereupon be submitted to the Committee on Journals and Printing for examination and approval.

"7. The entries in the parchment rolls of the society shall be made by the Sub-Treasurer from the paper roll, under the superintendence of the Committee on Journals and Printing.

"Rules 8 and 9 are hereby repealed."

The Rule was read a first and second time, and was ordered to be read a third time on 26th June next.

Moved by Mr. Martin, seconded by Mr. Moss,

Whereas the rooms known as the Library Rooms should be used exclusively for the purposes of a library, and none of the office business or affairs of the Society should be carried on or transacted therein, and such office and other business should be carried on in another portion of the building at some considerable distance from the library.

Resolved,—That a Special Committee to be composed of the Chairmen of the Standing Committees be and is hereby appointed to enquire into and report to Covocation the best manner of carrying into effect the changes suggested by the resolution, and it shall be the duty of the Special Committee to ascertain what rooms are available for the transaction of the office business of the Society, and also to report what new arrangements will require to be made to carry out efficiently the proposed new arrangements.

And that Mr. Irving be Chairman of the Special Committee, and that Mr. Shepley do represent the Reporting Committee in the absence of the Chairman.

The Secretary reported on the attendance of John Bell, Esq., Q.C., and the Hon. T. B. Pardee.

The Secretary reported that the parchment Student's Roll has been written up to Hilary Term, 1888.

The petition of D. R. Taite was read and considered.

Ordered, that the Secretary inform the petitioner that the prayer of the petition is not granted.

Convocation adjourned.

HALF YEARLY MEETING.

(Subject to confirmation at the next meeting of Convocation.)

Tuesday, 26th June.

Convocation met.

Present—Messrs. Beaty, Foy, Fraser, Hoskin, Hudspeth, Mackelcan, McMichael, Morris, Moss, Murray, Shepley and Smith.

Mr. Hoskin was appointed Chairman.

Mr. Morris, from the Legal Education Committee, presented the report of that Committee, on the admission of candidates entitled to be entered on the books of the Society as Students-at-Law of the Graduate Class as of Easter Term, 1888, under the provisions of Rule 6, section iv., of the Rules.

The report was received, adopted, and it was ordered accordingly.

Mr. Mackelcan, from the Discipline Committee, presented the report of that Committee on the case of J. Baldwin Hands, on the complaint of Miss Craine, which was received and read.

Ordered that it be considered on the 4th day of September next, being the second day of Term, and that a call of the Bench be made for that day.

A communication from the late Mr. Vankoughnet was received and read.

Ordered that it be referred to the Reporting Committee.

Letters from Mr. Hands were received and read.

A letter from Mr. Storm, accompanied by an estimate of the cost of the proposed improvements in the library, was received and read.

Ordered that Mr. Storm's letter and estimate do stand until next Term.

A letter from Mr. Grace, accompanied by a bill of costs, was read and referred to the Solicitor.

The Secretary reported on the application of Mr. J. G. Holmes for a Certificate of Fitness, that he had passed his examination and that his time expires to-day, the 26th instant, and that he has proved his service up to this date.

Ordered that a Certificate of Fitness he granted to Mr. Holmes.

Moved by Mr. Shepley, seconded by Mr. Mackelcan,

That Convocation would suggest to the Government of the Province the following methods for the improvement of the desk accommodation provided for the outer Bar:

1. In the Queen's Bench, Common Pleas and both Chancery Court rooms, the abolition of the passage separating the Bar seats from those provided for the public, and the utilizing of the additional space thus gained in providing the contemplated improved desk accommodation.

2. In the Court of Appeal the alteration of the front three rows of seats for the outer Bar into two rows only, with the improved desk accommodation contemplated. Carried.

Mr. Kerr's Rule to amend the Standing Orders of Convocation, Rules 3 to 9, section xxii, page 62 of the Consolidated Rules, was read a third time and passed.

A letter from Judge McDougall, was read, applying for the use of the Convocation Room, for the meeting of the county judges.

Ordered that the use of the room be granted to the county judges for their meeting.

Ordered that the Library Improvement Committee be authorized, if deemed expedient, to order the erection during vacation of such iron standard shelves on the south side of the library as may be required, in order to give further accommodation for the books.

Convocation adjourned.

DIARY FOR AUGUST.

1. Wed. ...Slavery abolished in British West India Islands, 1838.
5. Sun.....*10th Sunday after Trinity.*
6. Mon....Thomas Scott, 4th C.J. of Q. B., 1860. Prince Alfred born, 1844.
11. Sat.....Battle of Lake Champlain, 1814.
12. Sun.....*11th Sunday after Trinity.*
19. Sun.....*12th Sunday after Trinity.*
21. Tues ...1st Intermediate examination.
22. Wed. ...Ont. Jud. Act came into force, 1881.
23. Thur....2nd Intermediate examination. [1863.
24. Fri. ....St. Bartholomew. Sir Adam Wilson, J., C. P.,
26. Sun.....*13th Sunday after Trinity.*
28. Tues....Solicitors' examination.
29. Wed. ...Barristers' examination.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [June 23.

YARWOOD *v.* HART.

Breach of promise of marriage—Evidence—Corroboration—R. S. O. (1887), *c.* 61, *s.* 6.

In an action for breach of promise of marriage, the plaintiff swore to the promise, and the defendant denied it and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who showed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in 1880, and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent presents of jewellery, wearing apparel and money. Letters, also, were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages.

Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony, required by R. S. O. (1887), c. 61, s. 6.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress as it was with an engagement to marry.

Held, that the presumption was in favour of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise.

Clute, for the plaintiff.

Ritchie, Q.C., for the defendant.

Chancery Division.

Boyd, C.] [June 11.

SMITH *v.* METHODIST CHURCH.

Mortmain — Charitable Uses — Methodist Church—29 Geo. II. c. 36—14-15 *Vict. c.* 142 —47 *Vict. c.* 88 *(O.).*

A testator by his will bequeathed and devised all his property, real and personal, to a trustee upon trust, to convert the same into money and hold the proceeds upon trust; amongst other things, to pay to the treasurer, for the time being, of the Superannuated Fund of the Methodist Church, $1,000.

Held, that the said bequest was not void under 29 Geo. II. c. 36, which is commonly but inaccurately called the Mortmain Act, but is really an Act to prevent the devising of lands for charitable uses. The Statutes 14-15 Vict. c. 142, which incorporated certain benevolent societies under the name of the Conventional Society of the Wesleyan Methodist Church in Canada, and which provides that the corporation may take up, grant, devise, or otherwise dispose of any land or interest in land, and vests in the corporation all lands, etc., which should thereafter be granted, devised or bequeathed in any manner or way whatsoever in favour of the said corporation,

amounts to and indicates a repeal in favour of this corporation of so much of the Charitable Uses Act of 1736 as prohibits persons devising lands to a charity.

The said testator further provided that the trustees should, after meeting the prior bequests directed in the will, pay all the rest and residue unto the treasurer, for the time being, of the Brant Avenue Methodist Church, to be applied by them or their successors in reducing the debt existing against the church property.

Held, that this residuary bequest was invalid, for there was no special law empowering the said trustees to hold lands except under the Statutes already referred to, incorporating the Connexional Society of the Wesleyan Methodist Church in Canada, and 47 Vict. c. 88, s. 6 (O.), being the late Statute incorporating the Methodist Church. The first Statute, 14-15 Vict. c. 142, was intended to confer benefits mainly upon two objects; first, the book and printing establishment, and secondly, the Superannuated Preachers' Fund. It had no reference to individual churches at all, and all that is intended to be expressed by the later Statutes, 47 Vict. c. 88, s. 6 (O.), is that, as the Connexional Society has been merged in the new and larger corporation of the Methodist Church, the latter corporation shall stand in place of the other, with all its powers, rights, etc., for the purpose and objects thereof, that is to say, of the Connexional Society; and the language does not warrant the construction that the special privileges granted by the Act of 1851 are to be extended to all the purposes and objects of the new ecclesiastical corporation, and, therefore, the argument that s. 6 of 47 Vict. c. 88, enlarges indefinitely the capacity of the new corporation—the Methodist Church—to hold land for all purposes, including that contemplated in the above will for the endowment of particular churches of the body, could not be sustained. Here, the devise was not six months before the death of the testator, as required by the general law, R. S. O. (1887), c. 216, s. 19.

Harley, for the plaintiff.

Riddell, for the next of kin.

Osler, for A. W. Semmans and M. H. Phillips.

Maclaren, for the Methodist Church.

Brewster, for the trustees of the Brant Avenue congregation of the Methodist Church.

Ferguson, J.] June 21.

STEVENSON *v.* MCHENERY.

Misrepresentation—House described as "solid brick"—Insufficient description of lands in agreement.

Two houses were built with extensions in rear, in a terrace or row, the inside walls of the terrace and the extensions being brick, but the inside walls between the houses themselves and the adjoining houses, and also between the extensions and the main houses, to the heighth of the roofs of the extensions, being of wood, lathed and plastered; but the outside rear walls of the houses above the roofs of the extensions being brick resting upon timbers at the top of the wooden wall below.

Held, not to be "solid brick" houses.

The property in an agreement, for instance, was described as "135 ft. on G. ave., the same being 337 ft. west from R. ave., Parkdale, on the north side of said avenue."

It was shown that R. ave. was the west boundary of Parkdale, and G. ave. a street in it, which as such street would have its termination at R. ave., but it extended across R. ave. as a road or way outside of Parkdale, and no further description of said land was given, such as the depth or by reference to a plan or otherwise.

Held, that the property was not sufficiently described.

Moss, Q.C., for the plaintiff.

Laidlaw, Q.C., for the defendant.

Ferguson, J.] [June 27.

Re HARGIN AND FITZINGER.

Will—Devise—Properties—Real Estate covered—Occupation of tenant—Possession of testator.

A testator, by his will, provided as follows: "I will and bequeath to C. H. all properties, moneys and personal effects now in my possession for her own and sole use, to be disposed of as she may see proper."

Held, that this devise passed real estate.

Held, also, that real estate in the occupation of a tenant at the time of the testator's death was in the possession of the testator.

Hoyles, for the vendor.

C. J. Holman, for the purchaser.

Ferguson, J.] [June 29.

WRIGHT *v.* COLLINS *et al.*

Will — Construction — Wrong Description — Falsa Demonstratio.

Where a testatrix by her will devised as follows: "I give, devise and bequeath to my husband all my real estate, composed of the north-west quarter of lot number ten in the sixth concession of the township of Mersea;" and it appeared that she had never owned the said lands, but had owned and lived upon the north-west quarter of lot ten in the fifth concession of the township of Mersea.

Held, that by virtue of the fact that the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix which would, taken alone, be a sufficient description for the purpose of passing the lands really owned by the testatrix to the plaintiff, the part of the description referring to lot ten in concession six might be rejected as *falsa demonstratio*, and the lands really owned by the testatrix held to have passed to the devisee.

Hickey v. *Stober*, 11 O. R. 106; *Re Shover*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110, distinguished.

Clark, for the plaintiff.

Blake, Q.C., for the infant defendants.

Full Court.] [June 30.

QUEEN *v.* WEBSTER.

Municipal corporations — By-law — Favouritism — Delegation of functions — R. S. O. 1887, *c.* 184, *s.* 496, *ss.* 14.

On January 7th, 1880, the Council of the town of Parkdale passed a by-law, entitled "A By-Law to Regulate or Prevent the Carrying on of Manufactures or Trades Dangerous in Causing or Promoting Fire," whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from $5 to $20 imposed for each day that a violation of the by-law continued, with distress on default of payment, and imprisonment in default of sufficient distress.

Afterwards they passed another amending by-law, providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing, the said consent, however, to be submitted for approval by the Chairman of the Board of Works.

Held, that the by-law as amended was invalid within the principles laid down in *re Kiely*, 13 O. R., at p. 457, and in *re Nash and McCraken*, 33 U. C. R. 181, viz., because by requiring the consent of the owner of the adjoining buildings to be obtained it constituted three persons the judges of the right asked for, and divested the council of the power they should personally exercise, and by requiring the approval of the Chairman of the Board of Works it permitted favouritism, and all persons who desired to follow the same trade were not placed or might not be placed on the same footing. It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the enacting body alone under R. S. O. 1887, c. 184, s. 496, ss. 14.

Shepley, for the prosecutor and the magistrate.

G. W. Holmes, for the defendant.

Robertson, J.] [July 6.

Re INGERSOLL, GRAY *v.* INGERSOLL.

Registrar — Fees — Salary — Apportionment — R. S. O. (1877), *c.* 111, *ss.* 98-104.

Appeal from the report of the Master at Woodstock, made in reference to the claim of the county of Oxford against the estate of James Ingersoll, in respect to the proportion of the fees received by the said James Ingersoll, during the year 1886, in his capacity as Registrar of Deeds.

The said James Ingersoll died on August 9th, 1886, having received up to that date $4,042.75. His deputy filled the vacant position from August 9th, 1886, to August 25th, 1886, receiving $272.65 in fees, and the present Registrar was then appointed, and received during the balance of the year $2.444.85, making a total received of $6,760.25.

The county made their claim under R. S. O. 1877, c. 111, ss. 98 to 104, and it was contended

on their behalf that the account should be taken by allowing one salary to all these officers, based on the sum of $6,760.25, making the deduction on said amount, apportioning such deduction *pro rata* amongst each incumbent, and charging each with the amount so ascertained.

Held, contra, that the Master was right in rejecting this basis of computation, and in allowing the county only on the amount received by each of the several persons, thus letting the two latter out from any contribution, and making the contribution due from the estate of James Ingersoll $317 only, instead of $1,074, which would have been due on the other computation.

The meaning of s. 98 of the Statute is that each Registrar is not to account to the county for any sum whatever until after he has received the sum of $2,500, after which he is entitled to receive ninety per cent. of the excess of $2,500 up to $3,000, and after that eighty per cent. up to $3,500, and so on, according to the scale provided by the subsequent section. The Act being in derogation to the rights of Registrars as they previously existed, under the common law must be construed strictly.

Ball, Q.C., for the appellants, the Corporation of Oxford.

W. Nesbitt, for the executor.

Robertson, J.] [July, 6.

Re GRACY AND THE TORONTO REAL ESTATE CO.

Vendor and purchaser—Married woman—Conveyance by—Joinder of the husband.

A married woman, married between 1859 and 1872, acquired before the year 1868 a vested remainder in land subject to a life estate, and in 1886, the life tenant still being alive, conveyed her remainder, by deed, without her husband.

Held, that the conveyance was valid to pass the whole estate, and the life tenant having since died, a good title in fee simple under the conveyance could be made.

E. D. Armour, with him *G. G. S. Lindsay*, for the vendor.

E. T. Malone, for the purchaser

Practice.

Court of Appeal.] [May 8.

MERCHANTS' BANK *v.* LUCAS.

Evidence—Court of Appeal—Application for leave to adduce further evidence.

The defendants, upon their appeal from a Divisional Court, applied for leave to adduce further evidence to corroborate or strengthen that already taken upon a point which was argued before the Divisional Court, and decided adversely to the applicants.

The application was refused.

General remarks, per PATTERSON, J.A., on the reception of further evidence by appellate courts.

McCarthy, Q.C., for the applicants.

Robinson, Q.C., contra.

Armour, C.J.] [June 29.

COUSINEAU *v.* CITY OF LONDON FIRE INSURANCE CO.

Mistake—Effect of offer—Release—Costs "as between solicitor and client."

A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have.

Costs "as between solicitor and client" in an action includes such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action.

Aylesworth, for plaintiff.

C. Millar, for defendants.

C. P. Divisional Court.] [June 29.

LIVERNOIS *v.* BAILEY.

Costs, scale of—Setting off costs—R. S. O. (1877) *c.* 50, *s.* 347, *ss.* 3.

In an action for damages for breach of a contract, the jury awarded the plaintiff $68.50, and the trial judge entered judgment for that amount, and certified to entitle the plaintiff to costs on the Division Court scale, and to pre-

vent the defendant from setting off High Court costs.

On appeal, a Divisional Court varied the order as to costs so as to give the plaintiff such costs only as he would have recovered under R. S. O. (1877) c. 50, s. 347, ss. 3, where the judge at the trial did not certify.

Held, that there was no reason for making the defendant pay extra costs for the mistake of the plaintiff in bringing his action in the High Court.

J. W. Nesbitt, for the plaintiff.

Aylesworth and *H. H. Collier*, for the defendant.

Armour, C.J.] [June 29.

In re WHITE *v.* GALBRAITH.

Mandamus—Division Court—Amount—Jurisdiction—Abandoning excess of claim—Amendment at trial—Discretion.

General Rule 8 of the Division Courts provides that when the excess of a claim is abandoned, to bring the amount within the jurisdiction, it must be done in the first instance on the claim.

Held, that there is nothing in this rule to prevent the Division Court Judge permitting the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit; and general Rule 118, section 304, of the Division Courts Act afford ample authority for permitting such amendment; but the judge cannot be compelled by *mandamus* to exercise his discretion to permit an amendment.

Hands, for the plaintiff.

C. J. Holman, for the defendant.

Armour, C. J.] [June 29.

ALPHA OIL CO. *v.* DONNELLY.

Replevin—Direction of writ to liquidator of plaintiffs as sheriff—Irregularity—Waiver—R. S. O. (1877) *c.* 53 *s.* 9.

In a replevin action the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action.

Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance.

R. S. O. (1877), c. 53, s. 9, applies to the case of an application on the merits, and not for irregularity only.

Quære, whether, even if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and to the position of the liquidator as a mere officer of the court.

C. J. Holman, for the plaintiffs.

Aylesworth, for the defendant.

C. P. Divisional Court.] [June 29.

DISHER *v.* DISHER.

Writ of attachment—Setting aside—Powers of County Judge—Absconding Debtors' Act.

Although a County Court Judge has power under s. 2 of the Absconding Debtors' Act, R. S. O. (1877), c. 66, to order the issue of a writ of attachment from the High Court, such judge has no jurisdiction to entertain an application to set aside the writ.

Aylesworth and *Lancaster*, for the plaintiff.

W. M. Douglas, for the defendant.

Law Students' Department.

The following papers were set at the Law Society Examination for certificates of fitness and for call before Easter Term, 1888.

Certificate of Fitness.

REAL PROPERTY AND WILLS.

1. State shortly how a purchaser of lands may forego his right to have a good title made, and give examples.

2. Explain the operation and effect of the Registry Act with respect to competing purchasers.

3. When does the purchaser of mortgaged land incur an obligation to remove the mortgage, and when not?

4. Are the Statutes of Mortmain in force in Ontario? Why?

5. A devise to trustees in trust to permit A. B. to take the rents and profits. A devise to trustees in trust to pay A. B. the rents and profits. Was there any difference in the con-

struction of these devises before the Devolution of Estates Act? Explain.

6. What, if any, advantage is there in buying land at a judicial sale? Explain fully.

7. Upon breach of a condition in a lease, what proceedings are necessary to be taken by the landlord before he can forfeit the lease and eject the tenant?

8. A bargain and sale is made to A. B. to such uses as he may appoint. A. B. endorses on the deed "I hereby appoint the within described lands to C. D. in fee simple." Explain the effect of this.

9. On a purchase of lands from an administrator, what covenants can he be compelled to give? Why?

10. What is the present state of the law as to using words of inheritance in conveyances?

SMITH ON CONTRACTS AND BENJAMIN ON SALES.

1. Is it necessary to the validity of a delivery of a deed as an escrow (*a*) that it should be expressed in words to be an escrow; (*b*) that it should be delivered to some person other than the grantee? Reasons.

2. What is the difference, in point of validity, between a verbal lease, and a verbal agreement for a lease? Why?

3. What is the effect of a contract of sale of a thing which has ceased to exist? Reasons.

4. Has the knowledge of the vendor that goods are bought for an illegal purpose any, and, if so, what, effect on the validity of the sale?

5. Is parol evidence admissible (*a*) to show that a written contract has omitted a material term of the bargain; (*b*) to show that an additional term was verbally agreed to after the written contract was made? Reasons.

6. Explain the difference as regards the passing of the title between a sale of a specific chattel and a sale of unascertained goods.

7. In what ways may a sale on trial become an absolute sale?

8. What is the test by which it may be determined whether an affirmation made by the vendor of goods at the time of sale is or is not a warranty?

9. What is the effect of an offer of sale of goods which the vendor *agrees* to leave open for a specified time? Reasons.

10. Explain the difference in effect between a warranty and a condition precedent.

MERCANTILE LAW—PRACTICE—STATUTES.

1. A. is in insolvent circumstances, B. is a large creditor of A's. To save what he already has put into A.'s concern, B. makes a further advance and takes as security a mortgage on all A.'s real and personal property. On A.'s subsequent failure, what tests would be applied to the transaction to test its genuineness? Why?

2. A. is in trade. He desires to get an advance from B. to enable him to carry on his business, and asks B. to discount his (A.'s) promissory note. State the requisites for a chattel mortgage to be given by A. to secure B. against his indorsement under the above circumstances.

3. What powers has an agent entrusted with the possession of goods?

4. What is the difference between *general* and *limited* partnership, and how may a limited partner protect himself against outsiders?

5. A. is in difficulties. He has a policy of insurance on his life. He indorses on the policy a declaration that the policy is for the benefit of his wife and family. How far will such indorsement hold good against his creditors?

6. A. binds himself to serve B. for ten years from 1st January, 1888. They quarrel and separate, and B. sues A. for breach of the agreement. Can he succeed? Why?

7. In what cases may the Court now award an injunction with damages?

8. What right has the assignee of a chose in action who has notice of claims conflicting with that of his own assignee?

9. The pleadings in a case were closed on the 6th February, 1888. The venue was laid at C., at which place the sittings commenced on the 7th May. The plaintiff took no step except on the 6th April to get a commission to take evidence in Chicago, which was returned on the 21st April. What are the defendant's rights? Why?

10. State the results of the non-appearance at the trial of the plaintiff and defendant, respectively.

EQUITY.

1. Distinguish between the right of an unpaid legatee to compel other legatees to refund in cases where (1) there was an original deficiency of assets; (2) where there has been waste by the executor. Giving reasons for your answer.

2. Discuss briefly the doctrine of conversion. Is there any Provincial legislation which may affect the same; if so, what?

3. A. sells to B. a certain property for the price of $5,000; B. pays him $3,000 in cash. and gives him a note for the balance. How is a lien as an unpaid vendor affected? Explain.

4. What circumstances must appear in order to invalidate an award for mistake on the part of the arbitrators, (1) of law; (2) of fact?

5. A. dies intestate. B., his widow, comes to you saying that she wishes to administer the estate. State your mode of procedure.

6. State shortly the nature of the equitable relief granted, if any, in cases where by accident there is a failure to execute a power.

7. What are, and what are not, sufficient acts of part performances to take a parol agreement for the sale of lands out of the statute.

8. Distinguish between a mortgage and a pledge of personal property.

9. How far are settlements made in consideration of a wife's equity to a settlement binding upon creditors?

10. A trustee is uncertain how to proceed in the management of the trust estate. What course would you advise him to pursue?

Call.

REAL PROPERTY AND WILLS.

1. What effect, if any, have verbal statements and declarations made at an auction sale of lands by the auctioneer or vendor, upon the rights and liabilities of a purchaser, the sale being subject to written particulars and conditions?

2. Has an agent, for sale of lands, authority to receive and give a valid discharge for purchase money? Why?

3. What particulars must an agreement for sale of land contain so as to make it valid under the Statute of Frauds?

4. A land agent is instructed to find a purchaser for a building lot. He has been previously instructed by another person to look out for a lot upon which to build, and on showing him the lot in question, it is accepted, and the sale completed. He charges commission to both. Is he entitled to do so? Why?

5. In the absence of express agreement, whose duty is it to prepare the conveyance, and whose the mortgage, upon a sale of land? Who bears the expense of preparing each, and of getting each executed? Who bears the expense of registering deed and mortgage?

6. What is the effect of a *lis pendens* upon the rights of parties claiming subsequently thereto?

7. What will pass under a bequest of "ready money?"

8. Under a bequest to "issue," who will take?

9. Is there any case in which covenants for title will be implied in a conveyance? Explain.

10. A mortgagor becomes lunatic, and default is made in the mortgage. The power of sale is exercisable by serving notice on "the mortgagor, his heirs, or assigns." Can the power be exercised? Why?

HARRIS ON CRIMINAL LAW—BROOM'S COMMON LAW, BOOKS 3 & 4, BLACKSTONE, VOL. I.

1. Define an *accessory before the fact.*

2. What is an *affray;* and how does it differ from an *assault*, and from a *riot?*

3. If a man is tried for *murder*, and acquitted, can he be afterwards convicted of *manslaughter*, upon the same facts? Why?

4. For what different purposes may evidence of a prior conviction be given against a prisoner on a criminal trial?

5. Distinguish *robbery* from *larceny.*

6. Show in what way *intent* is a more important element in *treason* than it is in *murder.*

7. If a chattel in the possession of a *gratuitous bailee* be injured by a third party, by whom may an action for such injury be maintained? Reasons.

8. Upon what is an action of trespass to realty founded? Answer in one word.

9. State briefly the difference between the liability of a master for a tort of his servant, and that of a person for a tort committed by one, with whom he *contracts* for certain work to be done.

10. Into what three different classes is the *unwritten* or *common law* divided.

CONTRACTS—EVIDENCE—STATUTES.

1. What is meant by novation? Illustrate by an example.

2. "The revocation of a proposal takes effect only when it is communicated to the other party." Is there any exception to this rule? If so, what?

3. How far is a promissory note given for a betting debt good? Why?

4. Distinguish *fundamental error* from *mistake*. Illustrate by example.

5. How do you prove a deed at the trial of an action?

6. A., plaintiff, desires to examine B., defendant, as a witness at a trial, how can he compel his attendance, and what would be the consequences of his non-attendance?

7. A., counsel for the plaintiff closes his case; B., counsel for the defendant, announces that he has no witnesses to call. What is the order to be pursued in addressing the jury?

8. A., counsel for the plaintiff, at the trial wishes to put in evidence, as part of his case, letters written by B. the defendant; B.'s counsel objects that no notice to admit has been served. Could A. proceed to prove the letters? If so, how?

9. What is the rule as to place of trial in actions for libel?

10. How far can a party at a trial use certified copies instead of original documents?

EQUITY.

1. Sketch briefly the duties of trustees: 1. As to getting in outstanding property. 2. As to the custody of the property. 3. As to the proper investment of the same.

2. A., a resident of Toronto, dies intestate, leaving property in Canada and in the State of New York, and leaving debts in both countries. Letters of administration are taken out in each country. According to the law of the State of New York, there are certain debts entitled to priority in administering the assets in the State of New York, which law will govern, that of Canada or that of the States?

3. What is meant by consolidation of securities; in what cases, if any, will it be allowed in Ontario.

4. A. and B. have entered into a contract for the sale of lands; A. brings an action for specific performance, which B. defends, alleging misrepresentation on the part of A. What must he prove to succeed in his defence?

5. A testator, after making several bequests, bequeathed the residue of his estate to his executors "upon trust, to dispose of the same at such times and in such manner, and for such use and purposes as they shall think fit, it being my will that the distribution be in their discretion." Explain the effect of this devise.

6. A vendor of land in Toronto, after receiving part of his purchase money, hands the vendee his deed upon the promise that the balance of the purchase money will be paid, his vendee sells the property to B. Explain the original vendor's position in different aspects of the case.

7. What is a promoter of a company? Illustrate the doctrine of constructive fraud by an example of the dealings of promoters with the proposed company.

8. Under what circumstances will parol evidence be admitted for the purpose of showing mistakes in wills.

9. What is meant by a negative covenant being enforced by injunction? Illustrate.

10. A. brings an action against B. on a contract which contains a clause agreeing to refer all matters in dispute to arbitration. B. seeks to have proceedings in the action stayed; and the arbitration clause complied with; can he succeed? Explain.

Miscellaneous.

WE acknowledge receipt of the *Illustrated London News*, American edition. This is a faithful reproduction of the well-known English weekly, and we doubt not has a large circulation.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for July 7th and 14th contain The Sunday Question, and Matthew Arnold, *Contemporary;* Goethe, and The Cloister in Cathay, *Fortnightly;* The Patriotism of a Hereditary Peerage, *National;* Correspondence of Sir Henry Taylor, *Blackwood;* Some Ideas of Schopenhauer, *Gentleman's;* The Letters of Charles Lamb, and A Brother of the Common Life, *Macmillan;* A Poet of Prose, Some Recollections of Bishop Wilberforce, and Health-Resort Vignettes, *Temple Bar;* The Empress Victoria of Germany, *Argosy;* Vagaries of Speech, and A Religious Revolution in Japan, *Spectator;* Do Birds Transport Each Other Through the Air? My Brother Henry, and The Lake City of Borneo, *St. James's;* The Scientific Writings of Joseph Henry, *Nature;* Sledging Through Siberia, *Graphic;* Fatal Result of Morphia-Taking, *Lancet;* with instalments of "The Eavesdropper," and poetry. A new volume begins

with the number for July 7th. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Appointments to Office.

DEPUTY-GOVERNOR.

John Joseph McGee, Clerk of the Privy Council for Canada, to be Deputy-Governor whether the Governor-General be absent or not.

LIEUTENANT-GOVERNORS.

Province of Manitoba.

Hon. John C. Schultz, Winnipeg, on and after 1st of July, *vice* Hon. J. C. Aikins, whose term of office has expired.

Province of Nova Scotia.

Hon. A. W. McLelan, on and after the 9th of July, *vice* M. H. Richey, Q.C.

North-West Territories.

Joseph Royal, LL.D., St. Boniface, on and after 1st July, *vice* Edgar Dewdney.

DISTRICT AND LOCAL JUDGE.

Muskoka and Parry Sound.

William C. Mahaffy, Bracebridge, Judge of the District Court of Muskoka and Parry Sound, and Local Judge of the High Court of Justice.

CORONER.

Welland.

William B. Hopkins, M.D., Marshville, Associate Coroner for the county of Welland.

DIVISION COURT CLERKS.

Norfolk.

James F. Cohoe, township of Middleton, Fourth Division Court, *vice* Charles S. Harris, resigned.

Prince Edward.

Walter Ross, Picton, First Division Court, *vice* Robert Boyle, appointed *pro tempore.*

BAILIFFS.

District of Nipissing.

Louis Jodouin, township of Springer, First Division Court, *vice* H. Kinch, resigned.

Prince Edward.

Charles H. Wright, Township of Sophiasburg, Third Division Court, *vice* I. Hamilton, resigned.

District of Parry Sound.

Walter H. Sylvester, township of Armour, Fourth Division Court, *vice* Archibald Menzies, resigned

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabásis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Pecks' Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. SEPTEMBER 1, 1888. NO. 14.

WE again remind our readers that to-day the new Consolidated Rules come into effect. It is to be observed, however, that by the Rule of 9th June, 1888, it is ordered, "That Consolidated Rules 210, 211 and 212, shall not come into force on the first day of September next, nor until the further order of this court be passed, fixing a day for the same to come into force; and it is further ordered, that until such rules do come into force, all matters of practice and procedure affected thereby shall be deemed to be in force as if the same were in substance repeated in this Rule."

THE DEVOLUTION OF REAL ESTATE.

In our July number we published the letter of a correspondent signing himself "Solicitor," respecting the operation of the Devolution of Estates Act, 1886, now embodied in R. S. O. c. 108. At that time it appeared to us that the letter contained in itself a sufficient refutation of the objections taken to the Act, and for that reason we did not think it necessary to make any comments upon it; but we have since heard that some of our readers, at all events, have taken a different view, and think that the animadversions of our correspondent are well taken.

Stated shortly, the point made against the Act is this, that the heirs or devisees are no longer able to make a deed of the land, descended or devised, to a purchaser without a personal representative being first appointed.

There is no doubt that this is the case; but is it, after all, any real objection to the Act? Let us consider for a moment what the Act was designed to effect, but before doing so, it may be well to take a glance at the state of the law before its passage.

So far as the lands of a deceased person were concerned, it must be admitted that it was in a very anomalous position. The personal representative, executor or administrator, was charged by the law to see to the payment of the debts of the deceased, but, in most cases, he had no power to deal with what was oftentimes the principal asset of the estate, namely, the lands left by the deceased. The lands passed directly to the heir, or devisee, without the intervention of the personal representative; but though the latter had no control over, and no estate in the lands, yet, nevertheless, under a judgment recovered against him alone, to which neither heir nor devisee were parties, an execution might be issued under which the lands of the deceased might be sold.

Nothing could well be more anomalous or more illogical than this condition of things. While this was the state of the law as regards a deceased person's real estate, we all know that a very different system prevailed regarding his personalty; neither legatee nor next of kin had any right thereto, or to any part thereof, until the claims of creditors had been first satisfied. The residuum, after the satisfaction of all liabilities of the testator or intestate was all that was distributable among either legatees or next of kin, and in order that this distribution might not be made until the liabilities of the estate had been first liquidated, the assent of the personal representative to the distribution was necessary, and this assent would not be given until a reasonable time had elapsed, and proper precautions taken, by advertisement and otherwise, to ascertain what the debts and liabilities of the deceased were, and to give all claimants a proper opportunity to establish their claims.

So far as the personal property of the deceased was concerned, his next of kin or legatees could not lawfully take possession and divide it or sell it, without these preliminaries having been first taken.

Now, as we understand it, the object of the Act of 1886 was to place a deceased person's real property in precisely the same position as his personal estate—the devisees or heirs no longer take immediately from the testator, henceforth their title must, like that of legatees and next of kin, be derived through the personal representative. There is much to be said in favor of this change, not only for the security it affords to the creditors of a deceased person for the due application of his assets, both real and personal, but also for the difficulties which it will remove in making title. Formerly, one of the chief obstacles in making title where the land had passed under successive descents arose from the fact that the proof of the heirship of persons who claimed as heirs was so often attended with great difficulty and expense. This will now, to a great extent, if not altogether, be obviated by the deed from the personal representative, who, being directly concerned to convey the land only to the person rightfully entitled, will make it his business to see that the person claiming the conveyance is in fact the person lawfully entitled.

We are unable to agree with our correspondent that the objection he takes is any real defect in the Act. To permit the beneficiaries to convey, as he proposes, without the intervention of the personal representative, would be virtually to defeat the whole purpose and object of the Act. To be consistent, we think he should also contend that the next of kin of an intestate ought to be allowed to take the bonds and promissory notes of their deceased ancestor and indorse them over to third parties without the appointment of a personal representative. Such a proposition, we think, would be regarded as absurd, even by "Solicitor," and we confess our inability to see why, if it is necessary that a personal representative should be appointed before a valid title can be made to a promissory note or bond left by a deceased person—a different rule should prevail regarding his lands.

With regard to the question put by our correspondent as to whether a deed is necessary from the personal representative, we are inclined to think that there

is little, if any, doubt that such a deed is necessary. The effect of the Act is to vest the deceased person's real estate in his personal representative, and we do not see how the estate can be got out of him except by deed. Both the will and the personal representative's deed will be, henceforth, necessary links in the chain of title.

We are unable to see that the difficulty, which may in some cases arise in finding security for the due administration of the realty, is any objection to the Act. Why should not security be required for its due administration, just as much as for the due administration of personalty? Our correspondent fails to suggest any reason, and none occurs to us.

LEGAL EDUCATION.

THE people of Ontario take a pardonable pride in their educational system, which is justly deemed one of the best, if not the very best, in the world. The growth of successive generations, it shows the genius of its founder in the broad and liberal principles on which it is based. The fostering care of the State and the vigilant thoughtfulness of the successive heads of the department, are visible in almost every detail; the successive steps of its growth have kept pace with the foot-prints of our people along the pathway of material, social and politica development—nay, it has been one of the most potent factors in that development. At times its progress has been by rapid strides, at other times by steady plodding, but the march has been ever onward.

It might be a profitable exercise for any of those who are misled by the steadiness of the advancement of late years, into believing that we are at a standstill to make a comparison of the requirements of the various professions and callings which exact a certain amount of literary training for entrance therein, at the present time, and their requirements for a similar purpose ten years ago. Within a few years the training, whether literary or professional, exacted from teachers in our public and high schools has undergone such extensive changes as almost to revolutionize them. The curricula of our universities all indicate most unmistakably the same tendency in the direction of higher requirements. Every two or three years brings some change widening the scope of the matriculation examination in response to the increased facilities for primary and secondary education, and all these changes aim at the elevation of the standard of higher education. The various denominations, in the training of those who are to minister in spiritual things, follow the trend of the age. All of them encourage the taking of an arts degree, where at all practicable, and most of them exact, when the degree is not attainable, an increasingly high literary-standard. Quite lately admission to the medical profession has been made more difficult, or rather, less easy, and additional guarantees exacted that matriculants in medicine have had a fair preliminary training. In dentistry, pharmacy, and recently in land-

surveying, the spirit of the times has asserted itself. They all strive to keep pace with the advancing intelligence of the people due to the increasing efficiency of our public and high schools, and the more general spread of material prosperity, with its consequent leisure and opportunities. All these move onward abreast of the age.

It affords grave reason for shame-faced regret that the legal profession is the only one which has not directly availed itself of the benefits of the advances made in all things educational in the last ten years. It could not possibly avoid indirect gains therefrom, but it has received nothing but the ripe fruit that has fallen into its mouth, and has not put out a hand to shake the tree of knowledge. Its requirements for entrance for students-at-law are scarcely higher now than ten years ago, and the knowledge necessary to pass the primary examination was then, as now, in all conscience meagre enough. Every high school-master with experience in the preparation of candidates for the various examinations, will tell you that there is scarcely an examination with which he has to do, for which candidates can be "coached" with so little work and so great ease as the primary examination of the Law Society. A third-class teacher, without any knowledge of classics, wishing to study law, attends a collegiate institute or high school for a few months—three or four in most instances suffice. He "crams" his Latin, using translations, and attempts nothing beyond the rudiments of grammar or prose. His previous knowledge of the other subjects, with a very little brushing up amply suffices, and if he be not hopelessly stupid he passes. This is no fancy picture. Such instances are quite common; and the third-class teacher who passes in this way will compare favourably with the average of successful primary candidates. His knowledge of Latin is as good as that of his fellows, and his attainments in most other subjects are decidedly superior Such is the open door into a *learned* profession!

But the evil ceases not here. Raw and immature in mind—for he has had little mental discipline and no culture—devoid of habits, and without experience of methods of study, with meagre general information and scant intelligence, without skill in the use of his mother language as an instrument of expression, and pitiably ignorant of its literature, he vegetates in a law office for five years, now and then swallowing some stray crumb of legal learning lying in his way. No marvel that five years of such experience scarcely suffices to give him even a moderate degree of proficiency in the practice of his profession. The marvel would be if it were otherwise. The process is wholly unscientific. The practice presupposes the principles. How can one apply that which he does not know? The best possible preparation for acquiring skill in the practice of law, after the widening influences of liberal culture, is familiarity with the law itself; that having been gained, the practice can be, and has been, acquired in a relatively short time. From the educationalist's point of view, the process now in vogue is as unscientific as to attempt to teach rhetoric before grammar, or astronomy before algebra.

True, there are those engaged in the study, as well as in the practice, of law who have availed themselves of every facility which our institutions afford for

liberal culture. What they have attained has been gained, however, not through any facilities put in their way by the Law Society or its curriculum, but has rather been reached as the natural outcome of a graduated system of instruction, and of the inquiring spirit which that instruction fosters, and it has been reached by spending seven years in study, while those who enter by the wide-open door of the primary examination, beginning with inferior attainments, need spend but five. It is strong evidence of the general appreciation of the value of liberal culture that so many of those who enter upon the study of law, previously take an arts course. But their number is still much too small, and once professional study is commenced, they too, are thrown wholly on their own resources.

A strong feeling has been growing of late in the minds of many thoughtful and intelligent members of the Law Society that something must be done to elevate the standard of general culture within its pale, as well as to supply means for special legal training, or our ancient and honourable professson, in the midst of the general diffusion of intelligence by our schools, colleges and universities, will fail to win the respect and to exert the influence which its members look upon as its birthright. As was natural, the suggestions have been numerous, and the efficiency of the remedies for the admitted evils of the present mode of legal education would probably vary as much in degree as the proposed changes do in character.

Lectures at local centres under the management and control of the Society have been proposed, and, in some quarters, warmly advocated. The wisdom of such an experiment is doubtful. The lectures given in Toronto have never been a success; and it is not easy to see how the causes which have made such lectures a failure here, can be eliminated at local centres. When we say that the courses of lectures already established have been a failure, we intend no reflection on the present or on former lecturers. These have been not unfrequently able men, erudite and earnest. But the students do not attend. It is, we are told, no unusual occurrence for less than a dozen students to be present at a lecture. The average attendance is lamentably small; we are told that it is probably not more than five per cent. of the whole number of students-at-law in the province. The causes are not far to seek. The average student is largely incapable, owing to his lack of previous study and training, of profiting by the facts and principles presented to him in these lectures. He being often little more than a school-boy of meagre attainments, instruction by lecture is not suited to his capacity, or to his stage of mental growth. There is no inducement for attendance. He has an examination before him. To pass he must be familiar with certain text-books; these must be read, and a fair degree of familiarity with them is enough. He will be no further on if he attends every lecture. Then his presence is required in the office, his duties there conflict with the claims of lectures, and the latter suffer. It will not be easier to find suitable lecturers at local centres than at Toronto, the supply of available men will be smaller, the claim of professional duties on their time will be at least equally strong, students are as much occupied with routine office work, the incentives to attendance on lectures are no greater. It is not easy to see how the extension of the present system, confessedly a failure, can remedy the evil.

If lectures are to be beneficial the work must be divided into departments, according to a detailed curiculum ; the management of each department must be in charge of a specialist who can afford to make it the object of his undivided attention ; the course must be wide enough to give some idea of the broad principles which underlie law, and some acquaintance with the history of the institutions, events and influences which have moulded our jurisprudence, as well as with the minutiæ of law as it stands ; examinations must be based on subjects rather than text-books, and must be at least as much a test of legal culture as of legal knowledge.

An attempt to draft such a scheme has been made. Recognizing what must be duly considered at the outset in devising any effective course of legal study, the necessity of placing the purely theoretical, historical and scientific knowledge of law and cognate subjects before practical training in law as it is, and in the details of its administration by the courts, it seeks to unite the functions of the University and the Law Society, and to make each of them auxiliary to the other in rearing a race of jurists whose knowledge of law, scientific and practical—knowledge as to its rise, its development, and its administration—will reflect credit on themselves, their profession, and their country. Our readers are already tolerably familiar with the outlines of the proposal. And with this, as with every similar measure, more than an outline cannot at first be attempted. The principle must first be submitted, and approved, and when the outline has taken final form the details may be filled in.

The proposed Law Faculty is not without its defects ; but then nothing human ever was or will be. Many of the objections urged against it are the outcome of the aversion to change which always obstructs progress ; while some are purely fanciful, others are entitled to thoughtful consideration.

We are strongly of the opinion that the scheme must be so modified as to place all the Universities, as far as practicable, on the same footing in their relation to the Law Society. Otherwise the full benefit of the measure cannot be obtained, and the discrimination in favor of the Provincial University and against the others would operate unjustly.

The allegation that students taking the ordinary course of five years will be worse off than at present, owing to the abolition of the present lectures, requires little more than a passing notice. Students resident in Toronto are the only ones benefited by these lectures ; only a very small percentage of Toronto students attend them ; they fail of the object for which they are maintained ; and, if it be thought advisable, as indeed it probably would be, arrangements could easily be made for the attendance of five year men at as many of the lectures at Osgoode Hall under the proposed scheme as it would be desirable or beneficial for them to take. The objection, in so far as it is one, falls to the ground.

One writer urges that it is impossible for a boy of sixteen to acquire a tolerable degree of skill in conducting a solicitor's business in two years, even with "a two years' dabbling in the depths of international law and Roman jusisprudence." Closely allied to this is the assertion that the student who finds

it hard enough to read the work required for call in five years, will not be able to read that and the work required for LL.B. in four years. Graduates in arts, in rapidly increasing numbers, read both for call and LL.B. in three years now, and that, too, without help or guidance in their reading, and they all allege that they do not study nearly so hard as they did in their arts course. Any student of fair ability can easily pass his first intermediate examination with six weeks' reading. That has been done time and again, and the other examinations, though more difficult, are often disposed of creditably in less than double that time. The average law student reads little, except when an examination is near at hand, most of his five years is consumed in putting in his time under articles. Moreover, if it be the intention that the standard for matriculation into the proposed law faculty shall be so low that the average sixteen year old boy fresh from school can enter, then failure is indelibly stamped on the whole scheme from the outset. To make any such course beneficial, the matriculation examination must be at least as high as the senior matriculation or first year examination in arts. It is indispensable that the preliminary training received by the student before entering upon the course for LL.B. should be as thorough as possible. To overlook this would be to put a premium on ignorance.

The most formidable objection is one which, if real and insuperable, must be fatal. It is urged that few will care to take an arts course extending over four years, and then an LL.B. course requiring as much longer, when two of the main objects, admission to practice and the possession of a degree, can be obtained in four years. Any change sure to diminish the number of those who graduate in arts before commencing the study of law, is a change in the wrong direction, and will find no advocates. The desirability of obtaining the knowledge, the habits of study, the skill in making new acquisitions, and the strength and maturity of mind to be derived from such a course of study is universally conceded. The point at issue then is, does the new scheme tend to deter men from taking an arts course? and, if so, is that tendency so inherent in the warp and woof of the measure that it cannot be removed without the destruction of the whole fabric? It is well to observe that at present the arts man must spend seven years in study, as against the five spent in the more ordinary way. Yet the number of those taking the arts course as a preliminary is increasing. If two years longer do not deter him from so doing, must it of necessity follow that three will? But then it is urged he will take merely the LL.B. course, and so save four years. If the matriculation standard for the LL.B. course is put, as it ought to be, at least as high as the first year examination in arts, then the difference is still but three years. The benefits of the arts training are as great as ever, the number of those attending lectures in arts will undergo no dimunution; really the great majority of such students do not decide until graduation is at hand what their future profession is to be. The question comes to be, then, whether the young graduate of a university, influenced by the certainty of obtaining assistance in his legal studies similar to that of which he was able to avail himself in his arts course, and with the further incentive of another degree at the end of the curriculum, will not be willing to spend an additional year in study for the sake of the

benefits so obtained? But why not hold out some further inducement to the graduate in arts? The ordinary curriculum in medicine demands four years, but a graduate in arts completes it in three. There are surely no unconquerable obstacles in the way of making a programme of lectures and studies in law to occupy the attention of the rank and file four years, but which graduates can, if so inclined, dispose of in three. No more time will then be needed by the graduate to prepare for his profession than at present, he will do no more work then than he does now, when, as is not unfrequently the case, he combines with his strictly professional studies the work prescribed by the University for the degree of LL.B. He will have the by no means inconsiderable gain of complete and exhaustive courses of lectures on both, instead of, as now, reading by himself. The number of those who, by the help afforded by the lectures of skilled instructors devoted to the work of legal education, and by the degree to be obtained, as well as by the knowledge and discipline gained by the projected course would be led to enter on the broader field of investigation so opened up, instead of groping blindly along the labyrinths of legal lore for five years, would be but a partial test of its success. To benefit them would, however, be a part of its aim, and there seems no good reason for despairing of the realization of the hopes of even its most ardent promoters.

The details of the proposal, as formulated by the Joint Committee of the Provincial University and the Law Society, may require extensive modification; almost any scheme devised by human ingenuity will need improvements in the light of experience in working it. But we think that in the co-operation of the University and the Law Society is to be found the true solution of the problem of legal education.

In the meantime, until some such institution can be founded, the greatest service that the Law Society could render to legal education would be to abolish its primary examination, always a slipshod and superficial one, and exact in lieu of it, evidence that the candidate for admission had passed the first year examination of one of our Universities. This would be the most substantial advance made in general culture in the profession for many years. Incompetent and half-trained students would become fewer, and the way would be paved for some satisfactory system of purely legal instruction. The change suggested is not more radical than many of those made in recent years in departmental and university examinations, and its tendency would be to greatly increase the proportion of students-at-law taking a full arts course. Having completed the first year of the university curriculum, and having some experience of university life, many of them would go on to graduation. The time is fast coming when no young professional man need hope to occupy a respectable rank among his brethren, if his literary training has not reached at least this level.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE *Law Reports* for July comprise 21 Q. B. D. pp. 1-177, 13 P. D. pp. 89-119; and 38 Chy. D. pp. 237-287.

PRACTICE—EVIDENCE—FOREIGN COMMISSION—ORD. 37, R. 5.

Cock v. *Allcock*, 21 Q. B. D. 1, was an appeal from chambers, in which it was held by a Divisional Court (Field and Wills, JJ.) overruling Denman, J., that where material witnesses are resident abroad, the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence, is no sufficient ground for refusing an order for a commission, *Lawson* v. *Vacuum Brake Co.*, 27 Chy. D. 137, was stated by Wills, J., to be inaccurately reported so far as the head note is concerned.

PRACTICE—PROHIBITION—PROCEEDINGS ON CROWN SIDE—PROCEEDINGS AS PAUPER—ORD. 16, R. 22—ORD. 68, RR. 1, 2.

In *Mullensisen* v. *Coulson*, 21 Q. B. D. 3, it was held by Cave and A. L. Smith, JJ., that there was no power to admit an appellant to appeal *in forma pauperis* from the order of a Divisional Court granting a prohibition. Ord. 16, r. 22, was held not to apply to a proceeding on the crown side, as Ord. 68, r. 1, 2, expressly provides that Ord. 16, r. 22, shall not affect the procedure or practice in proceedings on the crown side. (See Ont. C. R. 1). We may observe *en passant* that the new Consolidated Rules of Ontario fail to prescribe any practice in civil proceedings for suing or defending *in forma pauperis*.

PRACTICE—SERVICE OUT OF JURISDICTION—DEFENDANT FOREIGNER RESIDING ABROAD—SERVICE OF WRIT—NULLITY—ORD. 11, R. 6; ORD. 70, RR. 1, 2—(ONT. C. R. 232).

Hewitson v. *Fabre*, 21 Q. B. D. 6, is another decision of Field and Wills, JJ., on a point of practice. By Ord. 11, r. 6, (Ont. C. R. 232), it is provided that where the defendant is neither a British subject nor in British dominions, notice of the writ of summons, and not the writ itself, is to be served upon him. In this case the defendant was a foreigner residing in France, who was sued for goods sold and delivered to him in England. The plaintiff obtained a judge's order for the service upon him of the writ out of the jurisdiction, upon an affidavit which, in good faith, but erroneously, stated that the defendant was a British subject; and under this order the defendant was served with the writ in France, and judgment was signed against him for default of appearance. Upon motion to set aside the judgment, it was held that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and the order for the service of the writ and all subsequent proceedings were set aside. The reason of the decision may be gathered from the following remarks of Field, J., after observing that the service of English writs on defendants in Ireland and Scotland had been the subject of complaint, he goes on to say:

"But the evil is greater in the case of foreign countries, the governments of

which resent the service on their subjects, without their leave, of process of the courts of other nations, and for this reason the alteration has been made in this rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Ord. 11, r. 6." (Ont. C. R. 232.)

PRACTICE—COUNTER-CLAIM—DEFAULT IN PLEADING—JUDGMENT ON COUNTER-CLAIM—ORD. 27, R. 11—(ONT. C.R. 727).

In *Higgins* v. *Scott*, 21 Q. B. D. 10, it was held by Pollock, B. and Charles, J., in accordance with *Buckhards* v. *Thurm*, cited in Snow and Winstanley's Annual Report for 1888, p. 379, that when a plaintiff makes default in pleading to a counter-claim for trespass, the only way the defendant can obtain judgment on the counter-claim, is by motion under Ord. 27, r. 11. (Ont. C. R. 727.)

PRACTICE—JUDGMENT AGAINST MARRIED WOMAN FOR DEBT CONTRACTED BEFORE MARRIAGE.

Downe v. *Fletcher*, 21 Q. B. D. 11, was an action against a husband and wife to recover a debt contracted by the wife before marriage, which took place after the coming into operation of the Married Women's Property Act, 1870, and the amending Act of 1874, but before the Act of 1882, and upon a motion for judgment which was referred to the Divisional Court, Lord Coleridge, C.J., and Mathew, J., held that it was unnecessary to show that the female defendant had separate property at the date of the judgment, but was entitled to judgment against the wife as against her separate property according to the form settled in *Scott* v. *Morley*, 20 Q. B. D. 132.

LANDLORD AND TENANT—ASSIGNMENT—SURRENDER BY ASSIGNEE OF PART OF PREMISES—LIABILITY OF ASSIGNOR ON COVENANT.

Baynton v. *Morgan*, 21 Q. B. D. 101, is a decision of a Divisional Court (A. L. Smith and Cave, JJ.), upon an appeal from a County Court, and the point decided was this: The plaintiff demised a house and premises to the defendant by deed containing a covenant by the lessee to pay the rent; the lessee assigned the term, the assignee by agreement with the lessor surrendered a small part of the demised premises, upon which was a scullery, and the plaintiff in consideration of his so doing paid the assignee £25, and erected a new scullery on another part of the demised premises; the present action was brought by the lessor against the original lessee, who contended that the effect of the surrender of a part of the demised premises was to create a new term as to the remainder of the property, and consequently to release him from liability on his covenant. The court were, however, unanimous that a surrender of part of the demised premises by an assignee does not have this effect. Counsel for the plaintiff conceded that the surrender of a part of the premises would entitle the lessee to a proportionate abatement of the rent; but Cave, J., without deciding the point, expressed the opinion that the lessee was entitled to no such abatement, that the liability of the lessee arising on contract, if he was liable at all, he was liable for the full amount of rent covenanted to be paid.

INSURANCE (MARINE)—CONCEALMENT OF MATERIAL FACTS—PRINCIPAL AND AGENT.

Blackburn v. *Haslam*, 21 Q. B. D. 144, is a case in which the law relating to the effect of concealment of facts upon the validity of a policy of marine insurance, which was pretty well discussed in the well-known case of *Blackburn* v. *Vigors*, 17 Q. B. D. 553; 12 App. Cas. 531, was again considered. In the latter case it was held that the insured was not liable for the concealment of facts from the insurer, which had come to the knowledge of the agent of the insured, but which had not been communicated by him to his principal. In that case the insured had made the contract of insurance through other agents than the one who had acquired the information which was concealed; but in the present case the jury having found that the same agent who had acquired the information, had commenced the negotiations for the insurance, which he subsequently handed over to his principals to take up at the point where the agent had left off; the Divisional Court (Pollock, B. and Charles, J.,) were of opinion that the principals were bound by the act of their agent in not disclosing the information they possessed to the insurer, and that therefore the policy was void.

ESTOPPEL—NEGLIGENCE—COMPANY—CUSTODY OF SEAL—LOSS BY UNAUTHORIZED USE OF SEAL—PROXIMATE CAUSE OF LOSS.

The Mayor of Staple of England v. *Bank of England*, 21 Q. B. D. 160, is a decision of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) in which, following *The Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389, they affirm the decision of the Divisional Court (Day and Wills, JJ.). The plaintiffs, a corporate body, had permitted their seal to remain in the custody of their clerk, who without authority, affixed it to powers of attorney under which certain stock in the public funds to which the plaintiffs were entitled was sold, and the clerk appropriated the proceeds. The plaintiffs claimed that the stock had been transferred without their authority, and the Court of Appeal held they were entitled to succeed, on the ground that the negligence of the plaintiff in trusting their seal to their clerk, was not the proximate cause of the loss, the proximate cause they held was the felony of the clerk in dishonestly affixing the seal; and that it could not be said that the felony was itself either the natural, or likely or necessary, or direct consequence of the carelessness of the plaintiff.

WILL AND CODICIL—EXECUTION OF WILL—ACKNOWLEDGMENT OF TESTATOR'S SIGNATURE—WILLS ACT, 1837 (1 VICT. C. 26), S. 9—(R. S. O. C. 109, S. 12).

In *Daintree* v. *Butcher*, 13 P. D. 102, the Court of Appeal affirmed the decision of Butt, 13 P. D. 67, noted *ante* p. 266.

COLLISION—MARITIME LIEN—ACTION IN REM.—CHARTER PARTY—IMPLIED AGREEMENT.

The only other case in the Probate Division is *The Tasmania*, 13 P. D. 110, an action to recover damages for a collision by defendant's tug with the plaintiff's vessel while towing her, under the following circumstances: The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be

answerable for loss or damage to any vessel in tow of their tugs (which were specified by name), whether occasioned by the negligence of their servants or otherwise. The tug in question, which was not one of those specified, was known by the plaintiff, who was a director of the defendant company, to have been chartered by the defendant company. This tug being hired by the plaintiff from the defendant company to tow the plaintiff's vessel, the collision took place in respect of which the action was brought, and it was held that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition. By the terms of the charter party the defendants were to appoint a captain as pilot, and all damages were to be for charterer's account. The collision was occasioned solely by the negligence of the defendant's captain; and it was held that an action *in rem* would not lie against the tug, because the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plainiff, the *prima facie* liability of the tug was rebutted.

PARTNERSHIP—SHARE OF PROFITS—ADVANCE TO CARRY ON BUSINESS—GARNISHEE ORDER—EQUITABLE CHARGE—NOTICE—PRIORITY.

Proceeding now to the cases in the Chancery Division, the first to be noted is *Badeley* v. *Consolidated Bank*, 38 Chy. D. 238, which is an appeal from the judgment of Stirling, J., 34 Chy. D. 536, noted *ante* vol. 23, p. 189. The Court of Appeal (Cotton, Lindley and Bowen L.JJ.), affirmed the judge below in holding that a garnishee order only binds the beneficial interests of the debtor in the debt attached, and that when a valid charge has been created on the debt attached prior to the garnishee order, the charge is entitled to priority over the garnishee order, even though notice has not been previously given by the chargee to the garnishee; but their lordships reverse the decision of Stirling, J., in finding that an advance made to a railway contractor upon an assignment of his contract and all his materials by way of security, and upon a covenant by the borrower to repay all advances within six months, and to pay the lender ten per cent. of the profits, constituted the lender a partner with the borrower. The Court of Appeal being of opinion that, although participation in profits is strong evidence, it is not conclusive evidence of a partnership; and that the question of partnership or no partnership must be decided by the intention of the parties, to be ascertained by the contents of the written instruments, if any, and the conduct of the parties, and that the stipulations in the deed. The expressions in the correspondence in the present case, were all consistent with the relations of the parties being lender and borrower, and not partners.

PLEADING—STRIKING OUT PLEADINGS AS EMBARRASSING AND UNNECESSARY—ORD. 19, R. 27—(ONT. C. R. 423)—EXERCISE OF DISCRETION.

Knowles v. *Roberts*, 38 Chy. D. 263, was an action to enforce a compromise, in which the plaintiff set out in his statement of claim the allegations as to his

right, and the corresponding liabilities of the defendant which were contained in his statement of claim in a former action. An application to strike out these allegations from the statement of claim having been made to the Vice-Chancellor of Lancaster, was dismissed by him, but the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), were of opinion that the application should have been granted, and the appeal was allowed, notwithstanding the order was made in the discretion of the judge below; because their lordships, in appeal, were of the opinion that he had not exercised his discretion "on right principles."

POWER OF SALE—MORTGAGE—NON-COMPLIANCE WITH POWER—CLAUSE PROTECTING PURCHASER AGAINST IRREGULARITY IN SALE.

Selwyn v. *Garfit*, 38 Chy. D. 273, was an action by a mortgagor to set aside a sale made by a mortgagee, under a power of sale in the mortgage, on the ground that the sale was made prematurely and before the period authorized by the power. The mortgage contained a clause relieving a purchaser under the power from inquiring as to the regularity of the sale. After the making of the mortgage the mortgagor had incumbered his equity of redemption. It was held by the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), affirming Kay, J., that the sale having been made before the period stipulated in the mortgage could by any possibility have expired, the sale was void; and that as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause, and that the mortgagor having incumbered his equity of redemption, and therefore not being in a position to waive the notice stipulated for by the power, the purchaser had no right to assume that there had been any such waiver.

JOINT TENANCY—SEVERANCE—MARRIAGE—WIFE'S CHOSE IN ACTION.

In re Butler, Hughes v. *Anderson*, 38 Chy. D. 286, the short point decided by the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), overruling North, J., who had followed *Baillie* v. *Treharne*, 17 Chy. D. 388, a decision of Malins, V.C., was that the mere fact of marriage does not operate as a severance of the wife's joint tenancy in a *chose in action* (bank stock), which has not been reduced into possession by the husband. A passage in Co. Lit., 1856, which appears at first sight to be opposed to this view, where Coke, after stating the rule as regards realty, says: "But otherwise it is of personal chattels," was shown by the court, by reference to other passages in Co. Lit. to refer not to all personal property, but merely to chattels in possession.

LIGHT—IMPLIED GRANT OF EASEMENT—DEROGATION FROM GRANT.

In *Birmingham, Dudley and District Bank* v. *Ross*, 38 Chy. D. 295, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirm a decision of Kekewich, J. In this case the corporation of a town granted a lease of a piece of land and a newly erected building, "with the rights, numbers and appurtenances to the said buildings belonging," to one Daniell, who subsequently assigned it to the plaintiffs. The building abutted on a passage twenty feet wide, which the corporation

agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high also owned by the corporation. The corporation demised the land on the other side of the passage to the defendant, who tore down the old buildings, and on their site erected a house eighty feet high, which materially interfered with the plaintiff's light. The land on both sides of the passage was part of a large piece laid out by the corporation upon a building scheme for the improvement of the town, and of this scheme it was held that the plaintiff's assignor, Daniell, had notice. Under these circumstances it was held that there was no express or implied grant of any right to the access of light over the buildings on the other side of the passage, as the same existed at the date of the lease to Daniell. The action which was for a mandatory injunction to remove the obstructive building was therefore dismissed with costs. It was argued by counsel for the defendant that the doctrine that the grantor grants so much as is reasonably necessary for the complete enjoyment of the premises did not exist except where the tenement granted adjoined physically the tenement which was left in the hands of the grantor, and that in the present case the intervening passage of twenty feet between the two parcels of land prevented the application of the doctrine; but this argument was held untenable.

PRACTICE—MARRIED WOMAN SUING BY NEXT FRIEND—SECURITY FOR COSTS.

In re Thompson, Stevens v. *Thompson*, 38 Chy. D. 317, the point of practice decided by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), affirming North J., was simply this, that where a married woman suing by her next friend obtained judgment without prejudice to an application by the defendant for security for costs on the ground that the next friend was not a person of substance; that an order for security on that ground was rightly granted, since the next friend alone was liable for the costs, and this, notwithstanding, that the married woman, if she had sued alone, would not have been liable to give security; and, it was held that the plaintiff after obtaining judgment by her next friend could not claim the right to sue alone.

PRACTICE—ADMINISTRATION ORDER—DISCRETION OF COURT—DIRECTION BY TESTATOR TO EXECUTORS TO BRING ADMINISTRATION ACTION.

In re Stocken, Jones v. *Hawkins*, 38 Chy. D. 319, it was held by the Court of Appeal affirming North, J., that nothwithstanding a direction by a testator to his executors to have his estate administered by the court, the court has still a discretion as to granting such an order, but that some weight ought to be given to such a direction, in considering whether or not the order should be made. Pursuant to such a direction in the will of their testator, one of the executors in the present case, after the lapse of a year from his death, applied for an administration order, which was granted, declaring the estate ought to be administered under the direction of the court, and directing an inquiry of what the estate then consisted; his co-executor, who was also beneficially interested, applied to discharge the order, as being unnecessary and likely to involve the estate in

unnecessary expense. North, J., having refused to discharge the order, his decision was upheld by the Court of Appeal, who expressed their approval of the limited form in which the order had been made.

PRACTICE—SERVICE OUT OF THE JURISDICTION—INJUNCTION.

The principle laid down in *Marshall* v. *Marşhall*, 38 Chy. D. 330, is important. An application was made by the plaintiff, resident in Scotland, for leave to issue a writ against the defendant, also resident in Scotland, for an injunction and damages, on the ground that the defendant was selling goods in England in such a way as to lead the public to believe they were the plaintiff's goods. But it was held that as an injunction in England could only be enforced against the defendant's agents and not against himself, the matter ought to be left to the Scotch Courts, and leave to issue the writ was therefore refused.

VENDOR AND PURCHASER—CONDITIONS OF SALE—TIME, WHEN OF THE ESSENCE OF THE CONTRACT.

It is not very surprising to learn that in *Hatten* v. *Russell*, 38 Chy. D. 334, Kay, J., decided that where a contract for sale fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract, so as to entitle the purchaser immediatly to repudiate the contract; if in consequence of a defect of conveyance merely, and not of title, the vendor is unable on his part to complete by the day named, and that where the defect is simply one of conveyance, and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so.

INTERNATIONAL LAW—DE FACTO GOVERNMENT—CONTRACT—DE JURE GOVERNMENT.

Republic of Peru v. *Dreyfus*, 38 Chy. D. 348, is a decision of Kay, J., on an important question of international law, to the effect that a contract made with a *de facto* revolutionary government by the subject of a foreign State which has recognized the *de facto* government, is one that by the law of nations is binding on the *de jure* government, if subsequently restored to power; and in litigating with such foreign subject in respect of rights arising out of such a contract, the *de jure* government must adopt the contract, and only such defences are open to it as would have been open to the *de facto* government.

CROWN PREROGATIVE—DEBTOR TO CROWN—PRIORITY.

In re West London Commercial Bank, 38 Chy. D. 364, brings up a point which does not often find its way into the reports, the crown prerogative as against its debtors. In this case letter receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post Office into a bank to their private account together with their own

moneys, and of drawing cheques both for their own purposes and for payments to the Post Office. The bank had notice that their customers were letter receivers, and drew cheques for Post Office purposes. The bank having gone into liquidation, the crown claimed payment in priority to other creditors of the bank of the balance due on the letter receivers' account in respect of Post Office moneys, and it was held by Chitty, J., following *Rex* v. *Ward*, 2 Ex. 301 *n.*, that the claim was well founded.

PRACTICE—DISCOVERY—TRANSCRIPT OF SHORTHAND NOTES—PRIVILEGE.

The short point of practice disposed of by North, J., *In re Worswick*, *Robson* v. *Worswick*, 38 Chy. D. 370, is that the transcript of shorthand notes of proceedings in open court, is not privileged from production, and it makes no difference whether the notes in question were taken by the party called on to produce them, or by a stenographer for him, or by his solicitor, counsel, or the solicitor's clerk.

SATISFACTION—ADEMPTION—LEGACY—DEBT.

In re Fletcher, *Gillings* v. *Fletcher*, 38 Chy. D. 373, North, J., held that where a testator, who at the date of his will owed his wife £625, and by his will bequeathed her a legacy of that amount; and subsequently in his lifetime paid her the debt, that the widow was not entitled to the legacy.

PRACTICE—PLEADING MATTER SINCE WRIT—ORD. 24 R. 3—(ONT. C. R. 440)—CONFESSION OF DEFENCE—JUDGMENT FOR COSTS.

In *Bridgetown* v. *Barbadoes*, 38 Chy. D. 378, the defendants pleaded a matter of defence arising after action brought, and the plaintiffs therefor filed a confession of such defence and signed judgment for their costs, which judgment on the application of the defendants was set aside by North, J., on the terms of the defendant withdrawing the defence arising after action.

PRACTICE—COSTS OF MOTION ADJOURNED TO TRIAL.

In *Gosnell* v. *Bishop*, 38 Chy. D. 385, Kekewich, J., held that where an action was dismissed at the trial with costs, the defendant was entitled to tax as part of his costs of the cause, the costs of a motion for an interim injunction adjourned to the trial, but not then brought on.

Notes on Exchanges and Legal Scrap Book.

CONTRACT AND PROHIBITION.—The Supreme Court of New Hampshire decided in *Jones et al.* v. *Surprise*, that a person who, in that State, solicits or takes orders for spirituous liquors, to be delivered at a place without the State, knowing, or having reasonable cause to believe, that, if so delivered, the same will be transported to a place within and sold in violation of the laws thereof, cannot recover the price of such liquors in the courts of New Hampshire, although the sale may be lawful in the State where it takes place. The rules of comity do not require a people to enforce in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates their public law. Comity will not extend the remedy afforded by the laws of that State, to enforce a contract valid in the State or country where it is made, when it is tainted by the illegal conduct, within the State, of the party seeking to enforce it.

STATUTE OF LIMITATIONS.—The Supreme Court of Rhode Island, in *Taylor* v. *Slater*, S. C. R. I. (25 Rep. 441), brought into one view the law on the subject of the effect of a payment, and a new promise upon the bar created by the Statute of Limitations. The facts were, that a married woman filed a bill in equity to enforce the payment of two promissory notes, one bought by her with the money belonging to her separate estate, and the other given for interest on that note. The Statute of Limitations was relied on by the defendant. It was conceded that the Statute of Limitations had begun to run on the original note before it came into her possession. The second note given for the interest was made payable directly to her, and was due upon demand. On the subject of the effect of a promise, the court says: "The question whether a new promise to pay a debt already barred by the statute creates a new cause of action, so that suit must be brought upon it instead of the original contract, has given rise to considerable diversity of opinion. On the one hand, it has been held in a number of cases, that such new promise is a new cause of action, and that suit must be brought upon it, and not upon the original promise. In these cases the court proceeds upon the theory that the debt is extinguished by the statute, but inasmuch as it has been extinguished by operation of law instead of by the act of the parties, a moral obligation to pay it remains, and this moral obligation is a sufficient consideration for the new promise. On the other hand, it has been held in numerous cases that the statute does not extinguish the debt, but only bars the remedy, that the new promise simply removes the bar of the statute, thereby enabling the plaintiff to recover upon the original contract, and does not create a new cause of action which can be made the basis of a suit and judgment. And there are cases which hold that suit may be maintained either upon the original debt or upon the new promise. But whatever difference of opinion may

exist with reference to the effect of a new promise in the case of a debt already barred, it is settled that a new promise, made before the debt is barred, does not create a new cause of action, but merely suspends the bar of the statute for another period of limitation dating from such new promise." And upon this last principle the case was decided.—*Central Law Journal.*

LIABILITY OF INSURANCE COMPANY.—A novel question was decided in *Baker* v. *Ohio Farmers' Ins. Co.*, Michigan Sup. Ct., holding that where the agent of an insurance company fills out and signs an application in which the property is declared to be unincumbered, although the assured in her oral application disclosed a mortgage thereon, the company is liable, notwithstanding the provisions of the policy exempting it from liability in case of misrepresentation by agents. The court said: "In the case under consideration the assured had in no manner authorized or permitted the agent to act for her, and his act, as before shown, was the act of the company, in which she had no part or knowledge. Nor was she bound in any way to know it, or to make inquiry in regard to it. We are not referred to any case wherein the policy of insurance contained the precise clause relied upon in the present case, to wit, that the 'company shall not be bound by any act or statement made to or by the agent or other person, which is not contained in the written application or indorsed on the policy.' The counsel admits that this language is comparatively new in the insurance policies, but claims that his view of the case, and the effect of this clause, is sustained by the following authorities: *Insurance Co.* v. *Lewis*, 30 Mich. 41; *McIntyre* v. *Insurance Co.*, 52 id. 188; *Cleaver* v. *Insurance Co.*, 32 N. W. Rep. 660; *Catoir* v. *Insurance Co.*, 33 N. J. Law, 487; *Moore* v. *Insurance Co.* (Iowa), 34 N. W. Rep. 183; *Chase* v. *Insurance Co.*, 20 N. Y. 55; *Enos* v. *Insurance Co.*, 67 Cal. 621; *Insurance Co.* v. *Fletcher*, 117 U. S. 519. In 20 N. Y., *supra*, the application was signed by the assured, and it contained a clause expressly stating that the company should not be bound by any act done or statement made to or by any agent or other person, which was not contained in such application. As the assured signed this application, he was presumed to know the contents of it. He was therefore not permitted to show the knowledge of the agent, who examined the premises and wrote up the application, that it was not correct in its statements. 20 N. Y. 55, 56. In *Enos* v. *Insurance Co.*, *supra*, the policy contained a provision 'that this company shall not be bound by any act or statement which is not contained in the written application or indorsed upon the policy.' It was held that the local agent could not waive any of the provisions of the policy. It does not appear from the report of the case what particular thing or point in the policy was undertaken to be waived, or in what manner, except that such waiver, whatever it may have been, was not written upon the application or the policy. 67 Cal. 622, 623. *Moore* v. *Insurance Co.*, *supra*, does not touch the point involved here, as will be seen by an examination of the case. The case of *Catoir* v. *Insurance Co.*, 33 N. J. Law, 487, was one where the policy contained the following clause: 'Agents are not authorized to make contracts for the company, nor to write upon

the policy except his signature, when necessary, to the first receipt of premium, nor to waive forfeiture of the same.' A premium was not paid in time, the result of which was to forfeit the policy, unless the plaintiff proved that the company had legally waived the payment as it became due. The plaintiff showed no waiver, except that the local agent had orally consented that the plaintiff could pay it afterward, 'when he had it.' The policy was upon the life of plaintiff's wife. Held, that the agent could not waive the payment in the face of this provision in the policy. In *Insurance Co.* v. *Fletcher*, *supra*, the assured signed the application, but it was claimed he did not know it was to be a part of his policy —that one agent read the questions over, which he answered truthfully, while another agent pretended to write down his answers; that he had no reason to suppose that such answers were taken down differently from those given; that he was asked to sign the paper to identify him as the party for whose benefit the policy was to be issued, and that he signed it without reading it, and did not read his policy when he received it, nor at any time. The answers so written were false, and not as the assured gave them. The application contained an agreement that, if any of the answers were false, the policy to be issued upon them was void. The court held it was 'his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. . . . If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing, and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.' *Insurance Co.* v. *Fletcher*, 117 U. S. 529. It will be seen that the principles laid down in these cases do not reach or govern the case at bar. *Insurance Co.* v. *Lewis*, 30 Mich. 41, distinguished. . . . The fraud of the agent was not her fraud, nor was she in any respect negligent. The company was negligent, and must suffer, rather than Mrs. Baker, for taking and acting upon an application wholly, signature and all, in the handwriting of an agent whom it declined in the express provisions of its policies to trust."—*Albany Law Journal.*

RAILWAY BRIDGES CROSSING HIGHWAYS.—A recent decision of the Court of Appeal is of some importance to the highway authorities throughout the country whose roads are crossed by railways, and it may be of general interest to our readers to indicate the nature and extent of the liability imposed upon railway companies to maintain the bridges which cross highways and the roadways upon or under such bridges. The Railways Clauses Act, 8 Vict. c. 20, s. 46, enacts, that if a line of the railway cross any turnpike road or public highway then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by

means of a bridge of the height and width, and with the ascent or descent by that or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all their necessary works connected therewith, are to be executed and at all times thereafter maintained at the expense of the company. This section deals with two cases, first, the case of a road carried over the railway by means of a bridge; and, secondly, the case of the railway being carried over a road. These two cases require separate consideration.

Taking the first of these cases, where the road is carried over the railway, we find that a question was raised as long ago as 1858 as to the liability to repair the roadway carried over the bridge. In the case of *Reg.* v. *North Staffordshire Railway Company*, 22 J. P. 112, otherwise reported as *North Staffordshire Railway Company* v. *Dale*, 8 E. & B. 836; 27 L. J. M. C. 147, the railway company contended that under the section already set out the road was to be distinguished from the bridge. The section, it was urged, provided that the road should be carried over by means of a bridge; therefore the road was something distinct from the bridge. The thing to be executed under the section was the structural work of the bridge, and it was that line which the company were bound to repair. The court, consisting of Lord Campbell, C.J., Wightman and Crompton, JJ., refused to adopt this view. They held that the section provided as well for the construction of the bridge and the roadway over it as for the future maintenance and repairs of both; and that the company was not only bound to make the bridge considered as the substratum of the roadway, but also the roadway on and over that substratum, and to maintain and repair such substratum and roadway. The same point was raised in the case of *Leach* v. *The North Staffordshire Railway Company*, 24 J. P. 71; 29 L. J. M. C. 150. In that case, by the special Act of the railway company, the company were required to erect a bridge over a certain highway where the railway crossed, and the Act provided that so much of the said road as should be broken up and damaged for the purposes of the Act should be reinstated and made good with such repairs as the road was then composed of, and the fences, wherever necessary, should be reconstructed and put into complete repair by the company, and kept in repair for the space of 12 calendar months after the making, forming, and completing thereof. It was held that an obligation to keep in repair the roadway over bridges and the approaches to bridges was imposed upon companies by section 46 of the Railways Clauses Act, and further, that such obligation was not taken away by the special Act which we have quoted. The court expressly affirmed the decision in *The North Staffordshire Railway Company* v. *Dale, supra.* The next case in which the point arose was that of *The North of England Railway Company* v. *Langbaurgh*, 28 J. P. 518. There it was contended that although the railway company were bound to make the bridge over the railway and the road, still they were not bound to maintain the road itself, for that was the proper duty of the inhabitants of the parish; but the court held that they were bound to follow the previous decisions, and that upon the authority of these decisions the company were bound not only to construct the bridge and the roadway and approaches, but to keep all these in repair for the future. From

the fact that the same question was raised in three cases, it may be inferred that the railway companies were not satisfied with the point decided, and accordingly in the recent case to which we have already referred they have made a bold attempt to have them overruled in the Court of Appeal. The case is *The Mayor, &c., of Bury* v. *The Lancashire and Yorkshire Railway Company*, 20 Q. B. D. 485. The result is that the previous decisions have been unanimously affirmed by the Court of Appeal. The Master of the Rolls said: "One thing is quite clear, that whatever works section 46 compels the railway company to execute, it likewise compels them to maintain for ever. In ordinary English a bridge includes the roadway upon it, over which people are to pass. If the railway company are to make that, as I think they are, they are also to maintain it." Fry, L.J., added some important observations upon the duty of the company as to the repair of the approaches to the bridge. It was argued, he said, that the "approaches" did not include the metalling on the arches or embankments, or whatever might be the substructure of the approaches. But surely the approach to a bridge must be something by which the bridge might be approached by the kind of traffic for which the bridge was to be used, and, therefore, must include the metalling of the roadway. If so it would be a monstrous conclusion that the company should be bound to repair the metalling of the roadway to the approaches, but not of the roadway of that of which they were approaches. It will be seen that, according to the decision of the Court of Appeal, a railway company is bound to keep in repair the roadway and the approaches to and upon a bridge which is carried over a railway, but the case where the railway is carried by means of a bridge over a highway is different, and depends upon different considerations. It will be observed that section 46 must necessarily differ in its application to such a case, for it provides that such *bridge* and the immediate approaches and all other necessary works connected therewith shall be executed and maintained by the company. The bridge in this case is the bridge which crosses the roadway, and no doubt the company are bound to keep that bridge in repair, but it was by no means clear whether the section has provided for the repair of the road under the bridge by the railway company. It was accordingly decided in two Irish cases, *Waterford and Limerick Railway Company* v. *Kearney*, 12 Ir. C. L. R. 224, and *Fosberry* v. *Waterford and Limerick Railway Company*, 13 Ir. C. L. R. 494, that the company were not bound to repair the road under the bridge. These cases were followed by the Court of Queen's Bench in England in *The London and North-Western Railway Company* v. *Skerton*, 28 J. P. 518; 5 B. and S. 559. There it was held that where the railway was carried over the highway by a bridge, the roadway being lowered to allow vehicles to pass under the bridge, the company were not bound to keep the slopes of the roadway in repair as being approaches to the bridge within the meaning of section 46. The result is that while in the first case where the road crosses the railway the company are bound to keep the roadway over the railway and the approaches in repair; in the second case where the railway crosses the road, even although the road may have been lowered to admit of the railway being carried across it, the company are under no liability to repair the roadway or the approaches to the bridge.—*Justice of the Peace.*

DIARY FOR SEPTEMBER.

1. Sat.....Long Vacation ends.
2. Sun.....*14th Sunday after Trinity.*
3. Mon....L. S. Trinity term begins. C.C. non-jury, York. Sir Edward Coke died, 1634, æt. 82.
4. Tues ...Court of Appeal sits.
6. Thur....Chy. Div. H.C.J. sits.
9. Sun.....*15th Sunday after Trinity.*
11. Tues....Gen. Sess. and C.C. sittings for trials in York.
13. Thur....Quebec taken and death of Wolfe, 1759.
14. Fri. ....Duke of Wellington died, 1852.
16. Sun.....*16th Sunday after Trinity.*
17. Mon....First Parliament of Up. Can. met at Niagara, 1792.
18. Tues....Quebec surrendered to the British, 1759.
23. Sun.....*17th Sunday after Trinity.*
28. Fri. ....W. H. Blake, 1st Chan. U.C., 1849.
30. Sun.....*18th Sunday after Trinity.*

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

GREENWOOD *v.* LONDON LOAN CO.,

Second mortgagee—Right to retain bonus in lieu of unearned interest on principal due through default in interest—R. S. O. c. 169 *—Rules of the company, how far binding on borrowers—R. S. C. c.* 127.

The plaintiff was a second mortgagee of lands of which the defendants were first mortgagees. The defendants' mortgage was for ten years, but in the third year they sold the land for default in payment of interest, retaining the arrears of interest, the principal, and $100 as a bonus or discount to compensate them for the lower rate at which any new loan would have to be made, money being worth only 6 per cent., while their mortgage was at 7½ per cent. This sum of $100 the plaintiff claims as a subsequent incumbrancer, contending that the defendant, had no right to retain it.

Held, that the signing of an application containing an agreement to be bound by the rules of the defendants' company made the mortgagor liable to pay this bonus or discount under those rules, notwithstanding the Registry Laws and R. S. O. c. 169.

Held, also that this is not a contravention of R. S. C. c. 127. *Green* v. *Hamilton Provident and Loan Co.*, 31 C. P. 574, cited and followed.

[ELLIOTT, Co. J.—London, July 27.

The plaintiff was the second mortgagee upon the land on which the defendants held the first mortgage, purporting to be made in pursuance of the Act respecting Short Forms of Mortgages, and containing power of sale in conformity with the form given in the Act.

The mortgagor being in default in the payment of interest, the defendants, in pursuance of the terms of their mortgage, claimed that the whole purchase-money became due, and in exercise of their power of sale they sold the mortgaged land, appropriated the proceeds towards the repayment of the principal, with interest and costs, and also, as it is termed, discounted the future payments during the unexpired term of the loan, which consists of several years.

W. H. Bertram, for plaintiff.

Geo. McNab, for defendants.

ELLIOTT, Co. J.—It is as to the right of defendants to retain the amount arising from this discount that the differences which are the subsubject of this suit have arisen. It is not disputed that the plaintiff, as second mortgagee, is entitled to recover $100 if he is entitled to recover anything, and the facts are admitted, so that the question to be solved is one entirely of law. The defendants rely upon *Green* v. *The Hamilton Provident and Loan Co.* (31 C. P. 574), where the same question was the subject of dispute. OSLER, J., in that case said: "If the question turned upon the terms of the mortgage alone, there would be nothing to support the defendants' contention. It is clear they would have no right to charge more interest than the principal money had earned. They could not by calling the latter in, either by a sale or otherwise, exact interest which had not accrued."

In that case and in this the authority to sell the mortgaged premises was contained in the power to sell given in the first schedule of the Act respecting Short Forms of Mortgages, which as amplified in the extended form, gives no authority to claim discount, so that in this respect the two cases are alike. Then, where is their authority for claiming this discount? There is nothing in the terms of the mortgage authorizing it, neither was there such authority in the mortgage held by the Hamilton company. In both cases the companies claimed by virtue of the rules regulating their proceedings, and in force when the loan was made to the mortgagors. Accordingly, unless there is something in this case to distinguish it from the Hamilton case, I must follow the latter. In the first place, let us see what is the statutory authority giving power for these rules. By 39 Vict. c. 32, s. 6, now to be found in R. S. O. c. 169, s. 66, it is enacted, after pointing out that borrowers need not be members, that "all borrowers from the society *shall be subject to*

all the rules of the society in force at the time of their becoming borrowers."

Now the rules relating to the claim for discount on further payments are the same in the Hamilton case as in this, and in the Hamilton case it was held that the rules must govern and give the right of their claim for discount, although in the absence of rules there would be no claim whatever to it; unless there is something else to distingnish the Hamilton case from this, I must disallow the plaintiff's claim. The only difference between the two cases I can see is, that in the Hamilton case it is recited in the mortgage that the mortgagor was a member of the society and applied for a loan, while in the mortgage in this case there is nothing of that kind. The mortgage in the Hamilton case was made in 1874, when borrowers were required to be members of the society, or at least, it was usual to make them such. But in 1876, by 39 Vict., aboye referred to, it became no longer requisite that borrowers should be members; so in the case of the mortgage in question, the mortgagor was simply a borrower, and that is not mentioned in the mortgage. But his written application to borrow from the defendant's society is admitted. By that S. undertook to be subject to the rules of the society, so that the only difference in the Hamilton case and this appears to be, that in the former the mortgagor was mentioned as being a borrower from the society, whereas there is no mention of that circumstance in the mortgage of S. It appears to me that the difference is unsubstantive; that S. was a borrower was made plain by the fact of the mortgage.

I must say that, were it not for the case of the Hamilton company, I should have found it difficult to get over the fact that in the mortgage there is no reference whatever to any rules, nothing to show that they are obligatory, and nothing appears to show that they were brought to the knowledge of the mortgagor further than in the application to borrow he acknowledged his submission to them. To supersede the subject of the statutory power of sale which, in drawing the mortgage, was invoked, and which disallows any claim to discount, and to make the rules paramount, and to ignore the effect of the Registry Laws, would have caused me some perplexity, were it not for the authority of this Hamilton case.

The plaintiff's counsel also refers to c. 127 Rev. Stat. of Canada, prohibiting any fine or penalty which increases the rate of interest payable, but does not prohibit a contract for the payment of interest on arrears of interest as principal, at any rate not greater than the rate payable on principal not in arrears. In this case it is not shown that there has been any contravention of this Act. On the contrary, the discretion of the directors under the company's rules has been, I understand, exercised by imposing the difference between the rate of interest in the mortgage, which is 7½ per cent., and the current rate of 6 per cent., and thus constituting the so-called discount on the future payments. It was further objected on behalf of the plaintiff that the rate of interest upon which the discount was to be calculated, should have been shown in the mortgage by virtue of the last mentioned statute, but the provision does not apparently apply to this question of discounting further payments. I arrive at the conclusion that, following the law of *Green* v. *Hamilton Loan Society*, my judgment must be for the defendant's company, but without costs.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

COATTS *v.* KELLY.

Fraudulent preference—Assignment for benefit of creditors—48 Vict. c. 26 (O.).

One Chamberlain, who was in insolvent circumstances, and indebted to K. in $120, was pressed by him for payment, when he agreed to sell K. a horse for $110 in part payment, and about the 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, when he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st October Chamberlain executed an assignment to

the plaintiff, in pursuance of the Act 48 Vict. c. 26 (O.) (1885), respecting assignments for the benefit of creditors. There was evidence tending to show that Chamberlain was insolvent when he sold the horse, but none that K. knew or had reason to know that fact.

In an action against K. to recover the horse, on the ground of fraudulent preference, the court below nonsuited the plaintiff, and on appeal to this court that judgment was affirmed with costs.

TODD *v.* DUN, WIMAN & CO.

Libel—Privileged Communication—Mercantile agencies—Pleading—Variance.

In an action against a mercantile agency company the alleged libel consisted of the publication, among the general body of the defendants' subscribers, of a notice or circular containing the words, after the plaintiff's name, "If interested, inquire at office." The defendants pleaded that the notice also contained words explanatory of the alleged libel which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of, it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

Held, that there was a variance between the libel alleged and that proved, and that the plaintiff should have been nonsuited.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel, consisting of the information given by him to the company, in answer to their request,

Held, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged; and there being no proof of express malice, the plaintiff was not entitled to recover.

It is the occasion of publishing the alleged libel which constitutes the privilege.

Where privilege exists implied malice is negatived, and the burden of showing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that defendant knew that what he was stating was untrue, is not evidence of express malice.

Judgment of the court below reversed.

Clark v. *Molyneaux*, 3 Q. B. D. 235; *McIntee* v. *McCulloch*, 2 E. & A. 390, referred to and followed.

Semble.—*Per* OSLER, J. A.—A mercantile agency company have no higher privilege for their business publication than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged.

CITY OF TORONTO *v.* TORONTO STREET RAILWAY CO.

By-law—Terms of agreement—Safety of public.

In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specifed, from time to time, and would at all times employ careful, sober and civil agents, conductors and drivers to take charge of the cars upon the said railway, and that they and their agents conductors, drivers and servants would at all times . . . . operate the said railways, and cause the same to be worked under such regulations as the Common Council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privilege granted by the agreement. Subsequently the privileges so conferred upon these persons were assigned

to the defendants, who continued to work the several railways, and after some years introduced for use thereon smaller cars drawn by one instead of two horses, as had been done previously, and with only one man in charge instead of two as on the large cars.

In 1882, the Council of the city passed a by-law (No. 1264) prohibiting the operation of any car within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel defendants to do so, the agreement of 1861 being relied on as warranting that relief.

Held [reversing the judgment of the court below] (1) that the by-law in question was not within the terms of the agreement, its provisions not being aimed at the protection of the public, that term as used in the agreement not including passengers in the defendant's cars, and that it was therefore *ultra vires;* (2) that the by-law was also invalid, as it was an invasion of the domestic concerns of the company.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [June 23.

CLARKE *v.* JOSELIN.

Rectification of contract—When ordered—Evidence—Exchange of mortgages—Liability of assignors.

In order to secure the rectification of an instrument the clearest evidence is required to be adduced; but the court need not stay its hand because one of the parties to the instrument chooses to deny that there is any mistake in it. The writing must stand as embodying the true agreement between the parties until it is shown beyond reasonable doubt that it does not.

If the court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of the witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should order rectification.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged.

S. R. Clarke, the plaintiff in person.

J. Reeve, for the defendant.

Divisional Court.] [June 23.

HOUSINGER *v.* LOVE.

Partnership—Judgment against partners—Payment by one—Enforcing against the other—R. S. O. (1887) *c.* 122, *ss.* 2, 3, 4—*Partnership accounts—Statute of Limitations.*

The plaintiff and defendant were partners, and judgment was recovered against them in 1876, by a bank upon certain promissory notes of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant.

The partnership accounts were taken by a referee whose finding, approved by the court, was that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C.J.—The Mercantile Amendment Act, R. S. O. (1887), c. 122, ss. 2, 3, 4, applies to the case of partners. *Small* v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164,

are to be disregarded, in view of the opinions of the judges of the Court of Appeal in *London and Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577.

Per STREET, J.—It is not necessary to inquire whether the statute relates to partnership dealings; apart from it the plaintiff is entitled, as surety for the defendant to the extent of one-half of the debt, to the benefit of the security, having made the payment with the intention of keeping the debt alive and not of extinguishing it, as shown by his taking an assignment; and the fact that a trustee was not introduced is not material. *Prima facie* the defendant was liable to pay one-half the judgment; it was, therefore, for his benefit that the partnership accounts were gone into; and he could not claim the benefit of the Statute of Limitations, more especially as he submitted to have the accounts taken, and did not raise the statute till after they had been taken.

G. C. Campbell, for the plaintiff.
Aylesworth, for the defendant.

Common Pleas Division.

The Divisional Court.] [March 10.

BOND *v.* CARMEL.

Illegal arrest and imprisonment—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in new conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of defence of "not guilty by statute"—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production of at trial—Admissibility in Divisional Court.

Action against two justices of the peace for the illegal and malicious arrest of the plaintiff, and the destruction of his stock of liquors. The defendant was arrested and convicted for having liquors for sale near public works, and imprisoned. Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof the plaintiff was discharged. Under a writ of *certiorari*, directed to the defendants, the conviction was returned not under seal. The return was made by the defendants' solicitor, to whom all the papers, including the conviction, had been delivered by the defendants to look over, and in his affidavit accompanying the return he swore that the conviction returned was the one made by the defendants. It was objected that the conviction should have been quashed before action brought.

Held, by ARMOUR, J., at the trial, that not being under seal, this was not necessary.

Haacke v. *Adamson*, 14 C. P. 201; and *McDonald* v. *Stickney*, 31 U. C. R. 581, followed.

It was urged at the trial, and in the Divisional Court, that the alleged return to the *certiorari*, being a *certiorari* in aid of a *habeas corpus*, did not preclude the defendants from putting in a properly sealed conviction. No such conviction, however, was produced, but one of the defendants stated that in his belief such conviction existed.

Held, that as the return was made to the *certiorari* directed to the defendants, and did not refer to the *certiorari* in aid directed to the gaoler, and in the face of the solicitor's affidavit, the conviction could not be received.

Per ROSE, J.—And for the additional reason that the evidence disclosed a want of *bona fides*.

The notice of action stated that the cause of action arose "in the month of May last, 1887, at said village of M., and in the town of P.," and was not served personally on the defendant C., but was served on his agent at his head office, also at his place of residence, and on his solicitor. The statement of claim alleged the service of each notice. The only defence was not guilty by statute, R. S. O. c. 73, s. 11, the section referring to notice being s. 10.

Held, by ARMOUR, J., and affirmed by the Divisional Court, that the statement of time and place, as well as the service, was sufficient.

Oliphant v. *Leslie*, 24 U.C.R. 398, followed.

Held, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules, when the defence of "not guilty by statute" is set up, the particular section of the statute relied on must be pleaded.

The venue was laid at Toronto, but was changed by order, and the action was tried at Port Arthur, in the district where the cause of action arose.

Held, that in such an action as this the venue need not be laid where the offence is committed.

Legacy v. *Pitcher*, 10 O. R. 620, followed.

Per ROSE, J.—The point was not taken in the motion paper, and this was not a case in which to review *Legacy* v. *Pitcher*, even if opened for review by *Ascott* v. *Lilley*, 14 A. R. 283.

From the village of M., where the arrest and conviction took place, and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction, and over fifty miles distant, the railway company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation was issued under R. S. O. (1877) c. 32, proclaiming this a public road; but, subsequently, the Dominion Government, by proclamation issued under R. S. C. c. 151, proclaimed the ten miles on either side of the supply road to be in the vicinity of the public work.

Held, by ARMOUR, J., and affirmed by the Divisional Court, MACMAHON, J., doubting, that the village of M. was not within three miles of a public work under R.S.O. (1877) c. 32.

Per GALT, C.J.—The place did not come within either Act, no proclamation having been issued at the time.

It was urged in the Divisional Court that the order for the destruction of the liquors, with a certificate indorsed, stating that the liquors were destroyed thereunder, though not produced at the trial, should now be received, and was a bar to the plaintiff's claim in respect of the destruction of liquors.

Per GALT, C.J.—There was no power to make the order, the authority to do so being based on R. S. O. (1877) c. 32, which was not made applicable; and, therefore, the order should not be received in evidence.

Per ROSE and MACMAHON, JJ.—The order was not dependent on the conviction of the plaintiff, and came within R. S. O. (1877), c. 73. The destruction was an act under an order, and the order must he quashed to avoid the protection afforded by s. 4; but

Per ROSE, J.—The order should not now be received; in any event there must be a new trial; but this would be of doubtful value, as it would only be on payment of costs of the trial and the motion.

Per MACMAHON, J.—The order should be received, but a new trial should be granted on this part of the case.

G. T. Blackstock, for the plaintiff.

McCarthy, Q.C., for the defendants.

Street, J.] (May 23.

MCARTHUR *v.* NORTHERN AND PACIFIC JUNCTION R. W. CO.

Railway—Company incorporated by Dominion Parliament—Line built through lands under timber license—Timber cut within and outside six-rod belt—Damage by reason of railway—Limitation of action.

The defendants, a railway company incorporated under an Act of the Parliament of Canada, built the railway through lands in this Province, the fee of which was in the Crown, but was under a timber license issued by the Ontario Government to the plaintiffs, and cut down and removed the timber both within and outside of the six-rod limit mentioned in R. S. C. c. 109, s. 6, ss. 12. The timber was all cut more than six months before action brought.

Held, that as to the timber cut within the six-rod limit, this was damage or injury sustained "by reason of the railway" under R. S. C. c. 109, s. 272, and the action was, therefore, barred by reason of its not having been brought within the six months; but that as to the timber cut outside the six-rod belt, the plaintiffs were entitled to damages.

A. R. Creelman, for the plaintiffs.

E. Martin, Q.C., and *W. Cassels*, Q.C., for the defendants.

Chancery Division.

Robertson, J.] [May 22.

BALDWIN *v.* KINGSTONE *et al.*

*Will—Devise—Heir at law—*14 & 15 *Vict. c.* 6 (*C. S. U. C. c.* 82)*—Moneys paid over six years—Moneys paid within six years under common mistake of law—Recovery of moneys which were the proceeds of lands vested by acts of the parties.*

A. W. B., by his will, dated August 14, 1850, after giving a life estate to his wife, provided as follows: "After the death of my said wife I devise the lands . . . known as Russel

Hill to my nephews the Hon. R. B. and W. A. B., sons of my brother the late Hon. W. W. B., deceased, their heirs and assigns forever, or in case of the death of them or either of them, in my own lifetime, then I devise the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his heir or their heirs and assigns," and died January 15th, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R B. (who predeceased him) him surviving. One of the daughters died July 10, 1866, unmarried and intestate, during the lifetime of the wife of A. W. B., the life-tenant who was in possession until her death, which happened on April 19, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, sold part thereof, dividing the proceeds thereof in equal shares amongst themselves, and partitioned part of the unsold balance thereof by deed dated Jan. 31, 1885, and in all respects dealt with the said lands, and the proceeds thereof, as if they were all equally interested therein, their father, the Hon. R. B., having by his will divided his estate equally between them, until May, 1886, when the plaintiff, the eldest son of the said Hon. R. B. was advised he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the said will, and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned lands. It was

Held, following *Sylee* v. *Deal*, 19 Gr. 601, that the Act 14, 15 Vict. c. 6, C. S. U. C. c. 82, abolishing primogeniture, which came into force January 1, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-law, and that the several divisions of property and money did not come under the head of family arrangements. But

Held, also that the moneys paid over more than six years before action could not be recovered; and following *Rogers* v. *Ingham*, 3 Ch. D. 35, that as to the moneys paid over within six years, an action for money had and received would not lie, for moneys paid by one party to another under a mistake of law common to both where both had a full knowledge of all the facts.

Held, also, that moneys not paid over, being the proceeds of lately sold lands, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common, and by the partition deed.

C. Robinson, Q.C., *Maclennan*, Q.C., and *Morris*, Q.C., for the plaintiffs.

Irving, Q.C., *McCarthy*, Q.C., and *George M. Evans* for the defendants, the trustees of Robert Baldwin, deceased.

Moss, Q.C., *W. Barwick*, for the defendant Ross.

Divisional Court.] [June 28.

JOHNSON *v.* CLINE, *et al.*

Fraudulent conveyance—To defeat, delay and hinder creditors—Unable to pay debts in full —48 Vict. c. 26, s. 2 (O.).

E. C. having entered into a partnership at the instigation of his wife, M. E. C. and family, conveyed certain land to her to prevent its becoming liable to any creditors of the new firm. He then, as agent of his wife, placed the same land in the hands of the plaintiff as a land agent to sell or exchange. Through the exertions of the plaintiff an agreement for exchange was arranged between the wife and one E. The plaintiff sued M. E. C. for his commission, and recovered a verdict against her. M. E. C. reconveyed the land to the husband E. C.

In an action to set aside the reconveyance as fraudulent and void against the creditors of M. E. C., it was

Held (reversing GALT, C. J. C. P.), that the conveyance by the husband E. C. to the wife M. E. C. was made to defraud creditors, and following *Mundell* v. *Tinhis*, 6 O. R. 625, that the court will not assist a person who has placed his property in the name of another in order to defraud his creditors, that M. E. C. had an interest in the property which could be made available to her creditors for the payment of her debts, and that the conveyance from M. E. C. was made with intent to defeat, delay and prejudice creditors, and that, as the evidence showed she was unable to pay her debts in full, it fell within the provisions of 48 Vict. c. 26, s. 2 (O.), and was void.

Moss, Q.C., and *Ritchie*, Q.C., for the plaintiffs.

Foster, Q.C., and *E. Meek* for the defendants.

Practice.

Ferguson, J.] [June 19.

SMITH *v.* FLEMING.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award.

It was provided in a lease that if the lessee should desire a renewal for a further term, and should give a defined notice, containing the name of an arbitrator, the lessors should and would, *at the expense of the lessee*, execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them.

Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee, but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference and half the costs of the arbitrators' fees, for which the action was brought.

A. C. Galt, for the plaintiffs.

S. H. Blake, Q.C., and *Tilt*, Q.C., for the defendant Fleming.

Arnoldi, for the defendants, the Rector and Churchwardens of St. James's Church, Toronto.

Falconbridge, J.] [July 11.

In re SOULES *v.* LITTLE.

Prohibition—Division Court—Defendant out of jurisdiction—Taking chances at trial—Delay in moving.

T., one of the defendants in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the court had no jurisdiction by reason of T.'s absence from the Province. No written notice of this objection was given before the trial, and there was a conflict of evidence as to whether it was taken at the trial; but at any rate, if taken at all, it was practically abandoned, and the defence rested on a different ground. The trial was on the 13th January, 1888, when judgment went for the plaintiff for more than $100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th May, 1888, moved for prohibition.

Held, that L. having taken his chances at the trial, and not having sufficiently accounted for his delay in moving, the discretion of the court should not now be exercised in his favor.

W. T. Allan, for the motion.

C. J. Holman, contra.

ELECTION COURTS.

Street, J.] [January 31.

EAST ELGIN ELECTION (DOMINION).

MERRITT *v.* WILSON.

Dominion Controverted Elections' Act—Inducing a voter to vote—Loan to voter—R. S. C. c. 8, s. 84 (a) 88, 91.

Where it was charged that an agent of the defendant paid, or offered to pay, money to a voter for travelling expenses and loss of time, and the evidence showed that prior to the election the said voter, on being asked by the agent if he intended to vote at the election, had answered that he did not think of doing so, as he could not spare the money to go; but that if he did go he would vote for the respondent, and the agent then gave him the cost of a return ticket, which he afterwards, without any demand being made for it, repaid; that the agent had previously lent the said voter sums of money, which had been repaid; that this transaction was, from the beginning, understood between the parties as a loan, and not as a gift; and that the loan was not made with the intention of influencing the voter's vote, or inducing him to vote for the respondent.

Held, that the transaction was not "bribery," or an unlawful act, or corrupt practice within R. S. C. c. 8, s. 84 (*a*), s. 88, or s. 91.

If the position taken by a voter is equivalent to that which would be expressed by his saying to the candidate or his agent, "I will not vote unless you lend me a sum of money," and the money is thereupon lent to him, then the lending of the money would be to wilfully induce the voter to vote within the meaning of R. S. C. c. 8, s. 84 (*a*). But if the position of the voter is equivalent to that which would be expressed by his saying "I am willing to vote, but cannot do so, because I have not the

means of going to the polling place," and the means are thereupon loaned to him to enable him to go to the polling place, then he is not induced, but merely enabled, to vote.

W. R. Meredith, Q.C., and *T. D. Crothers*, for the petition.

B. Cassels, Q.C., *J. H. Coyne*, and *Farley*, for the respondent.

Falconbridge, J.] [February 13.

WEST MIDDLESEX ELECTION.

MCNEIL *v.* ROOME.

Hiring Vehicles—Conveying voters to poll—R. S. C. c. 8, s. 88, 91.

Where it was charged that agents for the respondent had hired from certain livery-stable keepers vehicles for the purpose of conveying voters to the poll, and paid for the use of the same at the election, and the evidence showed that W., one of the livery-stable keepers (who were in partnership together), had acted as agent for the respondent, and under his partnership agreement with his partner had paid him half prices for each vehicle taken out by himself, and that the vehicles in question purported to have been taken out by himself, and he afterwards paid half prices on account of the same to his partner.

Held, that this amounted to a corrupt practice under R. S. C. c. 8, s. 88, 91, and the fact of W. being a member of the firm did not make it less a "hiring" of the vehicles.

S. H. Blake, Q.C., and *C. J. Holman*, for the petitioner.

W. R. Meredith, Q.C., *Harry Becher*, Q.C. and *McNeil*, for the respondent.

Appointments to Office.

ONTARIO.

COUNTY JUDGE.

Wentworth.

John Muir, of Hamilton, Junior Judge, and Local Judge of the High Court of Justice.

SHERIFF.

Rainy River District.

William H. Carpenter, of Fort William, Sheriff of the District of Rainy River, *vice* J. McQuarrie, Esq., resigned.

DIVISION COURT CLERK.

Prescott and Russell.

M. J. Costello, of the Township of West Hawkesbury, Clerk of the Seventh Division Court, *vice* Richard Lawlor.

NOVA SCOTIA.

COUNTY JUDGE.

District No. Seven.

Murray Dodd, Q.C., Sydney, Cape Breton, Judge of the County Court of the counties comprised in the above district.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the Subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements. Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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CROWN BONDS.

Among the recent statutes of the Dominion is one (51 Vict. c. 36) releasing lands from the operation of Crown Bonds registered in the office of the Queen's Bench. These bonds, so far as the Province of Ontario was interested therein, were released so long ago as 1873; but for some reason or other no similar Act was passed by the Dominion Government, and, consequently, bonds given by Dominion officials and registered in the Queen's Bench, continued to form a charge on their lands. This often resulted in great and needless inconvenience, delay, and expense in making title to lands, involving, as it did, searches for such bonds, and applications for Orders-in-Council for the discharge of any which might appear to be registered against former owners. The public and the professsion are indebted to Mr. Dalton McCarthy, M.P., for bringing about this useful piece of legislation.

OCCASIONAL RULES OF COURT.

We think objection may reasonably be taken to the mode in which the Occasional Rules of Court are published, or perhaps we should say, are not published. When any considerable number of Rules are passed, they are usually printed in pamphlet form, and official copies may be had at the booksellers by those who desire to have them. But in the case of single Rules, or one or two Rules, it is often thought unnecessary to print them at all, and the only steps taken to make them public are possibly the sending them to some of the Toronto daily papers, and they are sometimes published in this way in such a defective form that it is difficult to make out what they mean. This was notably the case with one of the Rules postponing the time for the Consolidated Rules to take effect. This method of publication is not at all satisfactory, and, to the country practitioners especially, exceedingly unfair. They, in common with the rest of the profession, are supposed to know the practice as prescribed by these Rules of Court, and yet there is no settled and established way by which they can keep themselves *au courant* with the Rules as they are promulgated. It was formerly the practice to publish the Rules in the Reports. That was certainly a better plan than not publishing them at all; at the same time it was not quite as convenient a method as might be suggested, because in due course the Rules got bound up with the Reports, and the Reports were not a suitable book of reference for such matters. A far better plan would be for the Law

Society to take steps to secure authentic copies of all Occasional Rules of Court as soon as they are passed, and have them printed in a uniform style, but separate and distinct from the Reports, so that they could be bound up separately—or interleaved in books of practice; and to distribute them along with the next number of the Reports issued after their passage. Our attention was drawn very forcibly to this matter the other day, when we were desirous of finding a Rule which had been passed under the statute relating to summary proceedings in criminal cases. Application was made to the Registrar of the Court of Appeal, who is supposed to be the officer of the court having the custody of its Rules, but he knew nothing about any such Rule. Application was then made to the Registrar of the Chancery Division, in which the particular matter was pending, and he was equally ignorant of any such Rule. Finally, on applying to the Common Pleas Division, a printed copy of a Rule passed in the High Court on the 17th November, 1886, was produced. We now print it for the benefit of our readers, in another column. This Rule, it seems, had been passed at a session of the judges when the learned Registrar of the Common Pleas Division was the acting Clerk, but strangely enough the other officers of the court, who ought to have been informed of its existence, seem to have been left in profound ignorance of it. We can only say, that if even the responsible officers of the court are thus left in ignoranee of the Rules, how can it be reasonably expected that practitioners can keep track of them? Even the consolidators of the Rules appear to have been ignorant of the existence of the Rule we have referred to, for by Rule 3 they have repealed all former Rules passed by any of the Superior Courts of Law or Equity in Ontario, except those mentioned in the schedule, and this particular Rule is neither referred to in the schedule, nor is it included in the Consolidated Rules. This matter is a crying grievance, which the learned judges and the Law Society between them ought to remedy, and we trust they will do so.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for August comprise 21 Q. B. D. pp. 177-309; 13 P. D. pp. 117-140; 38 Chy. D. pp. 385-506; and 13 App. Cas. pp. 241-505.

PRACTICE—EVIDENCE ABROAD—COMMISSION—DISCRETION.

Taking up first, as is our custom, the cases in the Queen's Bench Division, *Coch* v. *Allcock*, 21 Q. B. D. 178, is deserving of attention. This was an appeal from the Divisional Court, granting the order for a commission to take evidence abroad.

The court (Lord Esher, M.R., Lindley and Lopes, L.JJ.), though affirming the order, on the ground that the examination of the witnesses in question could be taken under commission at less expense than bringing them to England, and that there was nothing to show that their presence in court was essential, never-

theless affirm that a party is not entitled to a commission *ex debito justitiæ*, but that it is a matter of judicial discretion, and ought only to be granted on reasonable grounds being shown for its issue. Lord Esher, who delivered the judgment of the court, says, at p. 181: "The court must take care, on the one hand, that it is not granted when it would be oppressive or unfair to the opposite party, and, on the other hand, that a party has reasonable facilities for making out his case, when, from circumstances, there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration."

When a party applies for a commission to examine himself, he goes on to say that the discretion must be exercised in a stricter manner, which agrees with the decisions of our own courts in *Price* v. *Bailey*, 6 P. R. 256; *Thomas* v. *Story*, 11 P. R. 417; and *Mills* v. *Mills*, 12 P. R. 473.

COSTS—ARBITRATION—"COSTS OF REFERENCE"—COSTS OF NEGOTIATING AND SETTLING TERMS OF SUBMISSION.

In re Autothreptic Steam Boiler Co., 21 Q. B. D. 182, Huddleston, B., and Charles, J., were called on to decide whether or not the costs of negotiating and settling the terms of a submission to arbitration by consent, but not in a cause, could be considered as part of "the costs of the reference," which were in the discretion of the arbitrator, and they decided that they were.

JUSTICE OF THE PEACE—INFORMATION NOT DISCLOSING INDICTABLE OFFENCE—REFUSAL TO ISSUE SUMMONS.

Ex parte Lewis, 21 Q. B. D. 191, was an application for a rule calling on a police magistrate to show cause why he should not hear and determine an application for summonses against one of Her Majesty's Secretaries of State and the Chief of the Metropolitan Police, for prohibiting public meetings to be held in Trafalgar Square. The application had been refused by the magistrate, on the ground that no indictable offence was shown by the information; and it was held by Wills and Grantham, JJ., to whom the application for the rule was made, that when a magistrate has refused a summons, on the ground that the information does not disclose an indictable offence, the High Court has no jurisdiction to review his decision either as to law or fact, and they therefore refused the rule.

PRACTICE—PAYMENT INTO COURT—DEFENCE SETTING UP DENIAL OF LIABILITY.

The case of *Davys* v. *Richardson*, 21 Q. B. D. 102, is an appeal from the decision of Lord Coleridge, C.J., and Mathew, J., 20 Q. B. D. 722, noted *ante* p. 354. The Court of Appeal (Lindley and Lopes, L.JJ.) were of opinion that, as the plaintiff's solicitor had acted *bona fide* in taking the money out of court and paying it over to his client before any application to refund was made, he ought not to have been ordered to repay it, and they therefore varied the order to that extent.

RAILWAY COMPANY—PASSENGER—TICKET, FAILURE TO PRODUCE—CONDITION INCORPORATED BY TICKET—FORCIBLE REMOVAL FROM TRAIN—ASSAULT.

Butler v. *The Manchester and Sheffield Railway Co.*, 21 Q. B. D. 207, is an important decision on a question of railway law. The plaintiff was a passenger on the defendants' railway. The ticket issued to him incorporated, by reference, certain conditions published in the defendants' time-tables, one of which was that a passenger should show and deliver up his ticket to any duly authorized servant of the company when demanded, and any passenger travelling without a ticket, or failing to produce or deliver it up when required, should pay the fare from the station whence the train originally started. The plaintiff lost his ticket, and being unable to produce it when required, was required to pay the fare from the place where the train had started, and on his refusing to do so was forcibly removed from the train, no more force being used than was necessary. The action was brought for assault, and was tried before Manisty, J., and a jury, and a verdict was rendered for the plaintiff for £25; but Manisty, J., directed judgment to be entered for the defendants, holding it to be an implied term of the contract, that on failure to produce his ticket, the plaintiff might be removed from the train. The plaintiff appealed; and it was held by the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) that the contract between the plaintiff and defendants did not by implication authorize the defendants to remove the plaintiff from the train on his failing to produce a ticket, and refusing to pay the fare, as provided by the condition; that the defendants were not justified in so removing him, and that the action was therefore maintainable. Without actually deciding the point, Lord Esher, M.R., expressed a doubt whether, under the authority of *Saunders* v. *South-Eastern Railway Co.*, 5 Q. B. D. 456, the condition incorporated on the ticket was not unreasonable, and therefore not binding on the plaintiff. At all events he was of opinion that even if it were binding, it only gave the defendants the right to proceed against the plaintiff for the amount of his fare, and did not justify his forcible expulsion from the train. By C. S. C. c. 109, s. 25, s.s. 9, and R. S. O. c. 170, s. 41, s.s. 10, express power is given to expel a passenger from a train on his refusal to pay his fare, but it is open to question whether these provisons would warrant the expulsion of a passenger who had paid his fare, but lost his ticket. This case would seem to show that they would not.

NEGLIGENCE—DANGEROUS PREMISES—VOLENTI NON FIT INJURIA.

Osborne v. *London and North-Western Railway Co.*, 21 Q. B. D. 220, was an action brought against a railway company to recover damages for injuries sustained by the plaintiff by falling on steps leading to the defendants' railway station. These steps the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which the plaintiff might have used, and he admitted that he knew the steps in question were dangerous, and went down carefully holding the handrail. Under these circumstances it was contended by the defendants that the maxim *volenti non fit injuria* applied, and that they were not liable; but the

court (Wills and Grantham, JJ.) was of opinion, that in order to succeed on that ground it should have been found by the jury as a matter of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agreed to incur it." That there being no such finding, the admission of the plaintiff that he knew there was danger was not sufficient to entitle the defendants to succeed.

PRACTICE—COSTS—COUNTER-CLAIM AGAINST THIRD PARTY—ORD. 65, R. 1 (ONT. C. R. 1170).

Lewis v. *Trimming*, 21 Q. B. D. 230, was an action by a landlord against his tenant, in which the defendant brought a counter-claim for illegal distress against the plaintiff and a third party. The case was tried by a judge without a jury, and judgment was given for the plaintiff on the claim, and the counter-claim, but for the defendant against the third parties for £2 5s. 0d, "with such costs as the defendant would be entitled to by law." Upon taxation a question arose whether the defendant was entitled to any, and if any, what costs as against the third parties. On appeal to Huddleston, B., and Charles, J., they held that, as under Ord. 65, r. (Ont. R. 1170), the costs were in the discretion of the judge—the case having been tried without a jury—and there having been no exercise of such discretion in favor of the defendant, he was not "entitled by law" to any costs.

PRACTICE—CONTEMPT OF COURT—DISCHARGE OF PRISONER.

In re Davies, 21 Q. B. D. 236, is one of those cases which indicates the difficulty which courts of justice, from time to time, experience in maintaining their proper and lawful authority as against the "legal crank," a creature with which all courts are liable to be more or less troubled. In this case, Mrs. Davies, conceiving she had some right to certain property, and having failed in maintaining her right in a court of law, proceeded, in violation of the judgment of the court, to attempt to take forcible possession. An injunction was granted by Kay, J., restraining her from molesting the tenants of the property; but, nothing daunted, she renewed her attempt to take possession, and was ultimately lodged in gaol in December, 1886, where she had ever since remained, although she had been offered her freedom on her giving an undertaking not to renew her contempt, which she declined to do. With the consent of the plaintiff, the court (Lord Coleridge, C.J., and Mathew, J.) made an order for her discharge, on the terms that the injunction should be made perpetual during the currency of the plaintiff's tenancy, that a copy of the order should be handed to the owner of the premises with a view to his obtaining the assistance of all constables and peace officers in case the defendant should renew her attempt to obtain forcible possession. That in case the defendant should be guilty of a further contempt, the official solicitor should, at the plaintiff's request, take the necessary steps to bring the offending parties before the court; and that Mrs. Davies should not be allowed to take any further proceedings without the leave of a judge in Chambers, and that if she did, the same were to be communicated by letter to the official solicitor, and the respondents were to be under no obligation to appear thereto unless the court otherwise ordered.

INN—SUFFERING GAMING—IGNORANCE OF LICENSED PERSON—KNOWLEDGE OF SERVANT.

Bond v. *Evans*, 21 Q. B. D. 249, was a prosecution of an innkeeper for breach of a statute which imposed a penalty on any licensed person who "suffers any gaming, or unlawful game, to be carried on on his premises." Gaming had taken place on the defendant's premises to the knowledge of his servant, but without his knowledge; and it was held by Manisty and Stephen, JJ., that the defendant was bound by the knowledge of his servant, and was rightly convicted.

HIGHWAY—EXPROPRIATED LAND—POWER OF COMPANY TO DEDICATE PART OF LAND EXPROPRIATED AS A PUBLIC HIGHWAY.

The sole point decided by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) in *The Grand Junction Canal* v. *Petty*, 21 Q. B. D. 273, was, that where land is acquired by a public company under a statute, for the purposes of their undertaking, it is competent for them to dedicate it as a public highway, if such use by the public be not incompatible with the objects prescribed by the Act. In this case the plaintiffs, a canal company, had, under a statute, expropriated certain land for a towing-path, and it appeared that the use of it as a public foot-path was not inconsistent with its use as a towing-path, and it was held that the company could, under these circumstances, dedicate the land as a public foot-path, subject to its use by them as a towing-path.

CRIMINAL LAW—LIBEL—INDICTMENT FOR PUBLISHING A LIBEL "KNOWING THE SAME TO BE FALSE"—CONVICTION FOR PUBLICATION ONLY—(C. S. C. c. 163, s. 2).

The short point decided in *Boaler* v. *The Queen*, 21 Q. B. D. 284, was simply this, that on an indictment for publishing a defamatory libel, "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel.

LANDLORD AND TENANT—AGREEMENT FOR LEASE—FORFEITURE NOTICE—44 & 45 VICT. C. 41, S. 14 (R. S. O. C. 143, S. 11).

In *Swain* v. *Ayres*, 21 Q. B. D. 289, it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming the decision of Charles, J., 20 Q. B. D. 585, that an agreement for a lease is not a lease within the meaning of the Conveyancing and Property Act, 1881, s. 14 (R. S. O. c. 143, s. 11), and therefore the terms of that section do not apply to a tenancy under an agreement for a lease where there is no actual lease in existence, and no title to specific performance. In this case the defendant was in possession of the premises as tenant under an agreement for a lease, which provided that the lease to be executed thereunder should contain (*inter alia*) a covenant to keep the premises in repair, and a condition for re-entry for breach of such covenant. Rent had been paid under the agreement, but no lease had been executed. The premises being out of repair, the landlord brought the action to recover them as upon a forfeiture, without first giving notice under the above mentioned section. Referring to s. 14, Lord Esher says, at p. 292: "Does it apply to anything besides an actual lease in tangible existence? I am inclined to think it would be

correct to say that the section would apply to the case of something which in law is equivalent to an actual lease. What, then, would be such an equivalent? The distinction between law and equity is now abolished in the sense that the same court is to give effect to both, and that when the doctrines of law and equity conflict the latter are to prevail. I should, therefore, be disposed to say that when there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted, and was actually in existence." But he goes on to show, that by reason of the breach of the covenant to repair, without any circumstances such as a surprise, or some other excuse, the right to specific performance was lost.

BUILDING SOCIETY—BORROWING WITHOUT POWERS—DEPOSIT NOTE FOR LOAN CONTRACTED WITHOUT POWER.

In re Watson, 21 Q. B. D. 301, the directors of an unincorporated building society, which had no borrowing powers, borrowed money for the benefit of the society, and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated, and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, and ultimately agreed to refrain from legal proceedings on the directors giving him a deposit receipt for the amount due. The directors accordingly gave him a deposit receipt under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes of the directors. It was held by Cave and Wills, JJ., that the deposit note was not binding on the society. Wills, J., says, at p. 305: "In this instance every cardinal fact was equally within the knowledge of, and equally known to both of the parties, and the very object of the transaction was that which is its essential vice, according to my view, viz., that the money was borrowed for the purpose of repaying a loan illegally contracted, and to the payment of which, as a loan, the funds of the society could not be legally applied."

At the conclusion of his judgment he makes the following protest against the indiscriminate use of the words "fraud" and "fraudulent." "Fraud, in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions."

None of the cases in the Probate Division require notice here.

PRACTICE—COSTS OF MOTION ADJOURNED TO TRIAL.

In *Gosnell* v. *Bishop*, 38 Chy. D. 385, it was held by Kekewich, J., that on the taxation of costs under a judgment dismissing the action with costs, the costs of a motion by the plaintiff for an interim injunction, which was adjourned to the trial, but which was not brought on at the trial and was not alluded to, nor

anything said about the costs of the motion, might, nevertheless, be taxed to the defendant as part of the costs of the action.

SHARES IN FOREIGN COMPANY—PLEDGE OF CERTIFICATES—BLANK INDORSEMENT—DEFECTIVE TITLE—FRAUD.

Williams v. *Colonial Bank*, 38 Chy. D. 388, was a case in which there was a struggle between two innocent persons as to which should bear a loss occasioned by the fraud of a third party. The plaintiffs were the executors of an English holder of shares in an American railway, and in order that the shares might be registered in their names, so as to enable them to receive the dividends, and, if necessary, to sell the shares, signed blank transfers, together with powers of attorney indorsed on the share certificates, and gave them to their brokers in London, who fraudulently deposited them with the defendants to secure advances made to themselves, and afterwards became bankrupt. According to American law the certificates were not negotiable, but the rightful holder of them with the indorsed transfers was entitled to be registered as holder. By the practice of the railway company, transfers executed abroad by executors are required to be attested by a consul, which had not been done, and without this, they were not regarded in the Stock Exchange as duly indorsed, though this want of attestation would not prevent registration if the railway company were otherwise satisfied of the genuineness of the signatures. There was some evidence that, under the circumstances, the defendants would be entitled to be registered, on the ground that the plaintiffs had estopped themselves from disputing the title of the holders of the certificates. But it was held by Kekewich, J. (36 Chy. D. 659, see *ante* p. 73), and the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) that, as the question whether the defendants were to be deemed rightfully in possession of the certificates turned upon transactions in England, it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law. But the Court of Appeal differed from Kekewich, J., as to the effect of the defective transfer, and held that as the certificates did not represent on the face of them that the person in possession of them would be entitled to the shares, the absence of the consul's attestation made the transfer irregular, and was sufficient to put a party dealing with the brokers on inquiry, and the executors, therefore, were not estopped from disputing the title of the defendants, and must be held entitled to the shares as part of their testator's estate. The broad principle of law on which the Court of Appeal proceeded was "that except in the case of a sale in market *overt*, a person does not acquire a title to a personal chattel from anybody except the true owner."

PRACTICE—PARTICULARS OF DEFENCE.

Spedding v. *Fitzpatrick*, 38 Chy. D. 410, is a decision of the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) varying an order of Kay, J. The action was brought to restrain trespass on a road. The defendants set up that the road in question was a highway, and were ordered to amend so as to show the mode, or title, in or under which they claimed that the road had become a highway. The

defendants then amended by alleging that the road had for many years been used by the public, as of right, as a highway, having been dedicated to the public by the plaintiff and her predecessors in title, or some of them. Kay, J., then made an order that the defendants should deliver to the plaintiff full particulars of the nature of all acts of dedication relied on by the defendants, and if the defendants claimed by acts of dedication other than permissive uses, particulars of such acts, with dates, and by whom done. From this order the defendants appealed, and it was held by the Court of Appeal that although under the present system of procedure the Court will oblige a party to give such information as to the nature of his case, as is requisite to prevent his opponent from being taken by surprise at the trial, yet, that the order appealed from went too far, and should be limited to compelling the defendants, if they relied on specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, to set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made, and they varied the order accordingly.

COMPANY—SHARES ISSUED AT A DISCOUNT.

In re Almada and Tirilo Co., 38 Chy. D. 415, the question was very similar to that disposed of *In re Addlestone Linoleum Co.*, 37 Chy. D. 191 (noted *ante* p. 202). In this case a limited company issued shares at a discount, so as to render the shareholder liable for a smaller sum than that fixed as the value of the shares by the articles of association, and it was held that such issue was invalid, notwithstanding the contract with the shareholder under which the shares were issued was registered under the Companies Act of 1867, which had not been done in the *Addlestone* case. As Cotton, L.J., puts it, "It is perfectly clear that an agreement that you should pay 2s. on the shares you take, and not pay up the other 18s. which would make up the amount in money fixed by the memorandum of association would be entirely *ultra vires*." The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) therefore reversed the decision of Chitty, J., who had held that the issue of the shares was valid. See another case, *In re New Chili Gold Mining Co.*, point to the same effect.

"TRUE COPY"—BLANKS IN COPY—EFFECT OF.

Perhaps the only point for which it is necessary to notice *Sharp* v. *McHenry*, 38 Chy. D. 427, a bankruptcy case, is the decision of Kay, J., as to the meaning of the words "true copy." By the Bills of Sale Act, 1878, "a true copy" of a bill of sale is required to be filed with the registrar. In this case the copy filed stated the amount of the debt in the operative part, but by a clerical error in the power of sale, and also in the covenant for quiet enjoyment until default, the debt was referred to as "the said sum of ," though the blanks did not occur in the original; but it was held by Kay, J., that notwithstanding these omissions the copy was "a true copy" within the meaning of the Act, and that "a true copy" does not necessarily mean an exact copy, but one that is true in all essential particulars, so that no one can be misled as to the effect of the bill of sale.

WILL—REVOCATION—SPECIAL POWER OF APPOINTMENT—SUBSEQUENT REVOCATION OF GIFTS "IN FAVOR OF"—DEVISE OF POWER.

In re Brough. Currey v. *Brough*, 38 Chy. D. 456, Kay, J., decided that where a testator by his will gave to his sister H. a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share, and afterwards by a codicil revoked all devises and bequests "in favor of H.," that the power was thereby revoked, as well as the life interest.

RAILWAY COMPANY—SHARES—EXECUTORS—FORGED TRANSFER—FORGERY BY ONE OF TWO EXECUTORS—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16) S. 3.

In *Bartow* v. *North Staffordshire Railway Co.*, 38 Chy. D. 458, two points of some interest were decided. First, that where shares are standing in the name of two executors and trustees, registered and subject to the provisions of the *Companies Act*, 1845, and one of the executors and trustees executed a transfer of such shares, and forged the signature of his co-executor and trustee thereto, that such transfer was wholly void, and did not even transfer a moiety of the shares. Second, that in an action to compel the company to replace the stock, by the executor whose name had been forged, and a new trustee who had been appointed in the place of the forger, the cause of action arose not from the date of the transfer, but from the time when the company refused to comply with the application of the plaintiffs to replace the stock in their names. In answer to the contention that the transfer was good as to a moiety, Kay, J., says at p. 465, "This was answered by the late Vice-Chancellor of England in *Sloman* v. *Bank of England*, 14 Sim. 488. If the transfers were good as to one half, the other half would remain in the names of the two, and he might thus transfer one moiety of that, and so on until the residuum was infinitesimal."

COMPANY—ISSUE OF SHARES AT A DISCOUNT—REDUCTION OF CAPITAL.

In re New Chili Gold Mining Co., 38 Chy. D. 475, the point presented for adjudication was very similar to that *In re Almada & Tirito Co.*, noted *ante*. The liquidator of a company in voluntary liquidation entered into an agreement for the sale of its property to a new company, part of the consideration being the issue to each shareholder of the old company of a £1 share in the new company, with 15s. credited as paid up thereon, in exchange for each fully paid up £1 share in the old company held by such shareholder, the remaining 5s. to be payable by the allottee at the times mentioned in the agreement. The whole of the shares in the new company, 500,000 in number, were issued to the shareholders in the old company under this agreement. The company afterwards increased its capital by the creation of 500,000 more shares of £1 each, of which 50,000 were issued as fully paid up, as the consideration for the purchase of other property by the company, and 240,000 were issued at a discount of 15s. per share. After this had been done the company passed a special resolution for the reduction of the capital by cancelling paid-up capital to the extent of 15s. per share as having been lost or being unrepresented by available assets. The company having petitioned for the confirmation of this resolution by the court, and there

being no evidence of any loss of capital otherwise than by reason of the issue of the shares at a discount, it was held by North, J., that the issue of the shares at a discount was illegal, and that the shareholders were still liable to the extent of 15s. per share, and the proposed reduction of capital could not, therefore, be sanctioned.

EQUITABLE MORTGAGE OF REVERSIONARY INTEREST—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT. C. 57), SS. 1, 2 (R. S. O. C. 111, S. 5, S.S. 12).

Hugill v. *Wilkinson*, 38 Chy. D. 480, disposes of what appears to be a new point under the Statute of Limitations. Joseph Wilkinson, being entitled to a reversionary interest in the real estate of his grandfather, Joseph Hugill, expectant on the life of a certain person who died in 1886, in 1870, in order to secure a loan of £150, charged this interest in favor of John Wilkinson. Joseph Wilkinson afterwards became bankrupt, and his reversionary interest, subject to the charge, vested in the official receiver. The present action was brought for the partition of Joseph Hugill's estate, and a reference was directed as to the parties interested. Upon this reference John Wilkinson carried in a claim as an incumbrancer on Joseph Wilkinson's share, and his claim was contested by the official receiver, on the ground that it was barred by the Statute of Limitations. But North, J., held that, though the personal claim against Joseph Wilkinson might be barred, yet the claim against the land was not barred, because the time did not begin to run for the purpose of barring a foreclosure until the reversionary interest fell into possession.

COMPANY—TRANSFER OF SHARES—DEFECTIVE TRANSFER—INCHOATE LEGAL TITLE—PRIOR EQUITABLE TITLE.

Roots v. *Williamson*, 38 Chy. D. 485, presents some points of similarity to *Williams* v. *Colonial Bank*, noted *supra*. The deed of settlement, under which a company was formed, provided (1) that no person should be treated as a shareholder unless and until he had been registered in the register of shareholders; (2) that no person should be registered as a shareholder until by execution of the deed of settlement, or some deed referring thereto, he should have undertaken all the obligations of a shareholder; (3) that every transfer should be made by deed, to be left at the office of the company.

The plaintiff purchased shares in the company, which were transferred to, and registered in the name of, one Williamson, who held them as her trustee. Williamson, being indebted to the defendants, in fraud of the plaintiff, executed to the defendants a transfer of the shares; the deed of transfer (which did not refer to the deed of settlement) was sent by the defendants, together with the certificates for the shares to the office of the company for registration, but the defendants did not execute, or offer to execute, the deed of settlement. The company having received notice that the plaintiff claimed to be the beneficial owner of the shares, did not register the defendants' transfer. This action was brought by the plaintiff to establish her title to the shares, and it was held by Stirling, J., that the defendants had neither a complete legal title to the shares, nor, as between themselves and the company, an unconditional right to be regis-

tered as shareholders, and that their title being inchoate only, was insufficient to defeat the plaintiff's prior equitable title.

TENANT FOR YEARS—PERMISSIVE WASTE.

It will be useful to refer to *Davies* v. *Davies*, 38 Chy. D. 499, if for no other reason than to note the view expressed by Kekewich, J., on the subject of the liability of a tenant for years for permissive waste, a point that is not altogether free from doubt.—See *Barnes* v. *Dowling*, 44 L. T. N. S. 809. The question arose in this case under the following circumstances: By 40 & 41 Vict. c. 18, s. 46, tenants for life are empowered to make leases for twenty-one years binding on the remainderman, but such leases are not to be made "without impeachment of waste." Under this statute a tenant for life made a lease for twenty-one years, but exempted the lessee from liability for "fair wear and tear and damage by tempest," and Kekewich, J., held that this provision rendered the lease void, because it exonerated the lessee from liability for permissive waste for which he would otherwise have been subject.

MUNICIPAL ELECTION—DUTY OF RETURNING OFFICER—DISQUALIFICATION OF CANDIDATE.

In *Pritchard* v. *Mayor of Bangor*, 13 App. Cas. 241, the House of Lords, we are glad to see, has affirmed the decision of the Court of Appeal in *Reg.* v. *Mayor of Bangor*, 18 Q. B. D. 349, noted *ante* vol. 23, p. 142, holding that it is the duty of a returning officer, at a municipal election, simply to count the votes, and to declare to whom the majority has been given, and that he has no jurisdiction to pronounce upon the qualification of the candidates, or to declare that the candidate having the minority of votes is elected, on the ground of the disqualification of the candidate having the majority.

LANDLORD AND TENANT—DEMISE TO TWO AS TENANTS IN COMMON—COVENANT, WHETHER JOINT OR SEVERAL.

The point involved in *White* v. *Tyndall*, 13 App. Cas. 263, was a very simple one, but one which seems to have caused a conflict of opinion in the Irish courts. Premises were demised to G. and A., "their executors, administrators and assigns," *habendum* to "the said G. and A., their executors, administrators and assigns, as tenants in common, and not as joint tenants," at a single yearly rent; and G. and A. covenanted, "for themselves, their executors, administrators and assigns, that they, the said G. and A., or some or one of them, their executors, administrators or assigns," would pay the rent and keep the premises in repair. G. having died during the term, the lessor sued A. and the executors of G. for breaches of the covenant occurring after G.'s death. G.'s executors contended they were not liable, and the sole question was whether the covenant was joint or several. The Irish Common Pleas Divisional Court held the covenant to be joint only, and, therefore, that G.'s executors were not liable. The Irish Court of Appeal, on the other hand, held that the covenant must be construed by reference to the interests of the covenantors, and that as they were tenants in common, the covenant was joint and several. The House of Lords, however, reversed the Court of Appeal, and affirmed the decision of the Divisional Court.

LANDLORD AND TENANT—LEASE—CONSTRUCTION.

In *Dynevor* v. *Tennant*, 13 App. Cas. 279, the House of Lords affirmed the decisions of the Court of Appeal (33 Chy. D. 420), and Pearson J. (32 Chy. D.,375). The case turned upon the construction of a lease. D. and C., being co-owners of an estate, made a lease, for a term of one thousand years, of a strip of land intersecting the estate, to a canal company for the purpose of making a canal, subject to a proviso that nothing should prevent D. and C., "their heirs or assigns," from using any of the land demised, or any stream of water flowing over the same, or from granting any way-leases across the same for the carriage of goods, etc., or for any other purpose in like manner, as they could have used the same in case the lease had not been granted, but so as not to injure the canal. The canal was made and the estate was afterwards partitioned between D. and C., the reversion in a portion of the land covered by the canal being conveyed to C., and the adjoining lands on each side being conveyed to D. C. subsequently conveyed the reversion in the canal to the company. D., as owner of the lands intersected by this portion of the canal, claimed the right to grant way-leases, etc., and build a bridge across it, for the purpose of making an access from one side to the other. The House of Lords, however, came to the conclusion that the proviso in the lease operated as a covenant with D. and C. as owners of the reversion, and not as owners of the adjoining lands; that this covenant ran with the reversion, and that when the reversion in that portion of the canal became vested in the lessees, there was a merger, and the rights under the proviso were extinguished as to that part of the canal.

CONTRACT INDUCED BY MISREPRESENTATION—RESCISSION OF CONTRACT—PARTNERSHIP—DAMAGES.

In the case of *Adam* v. *Newbigging*, 13 App. Cas. 308, the House of Lords affirmed the decision of the Court of Appeal (34 Chy. D. 582), noted *ante* vol. 23, p. 229. In this case it may be remembered the plaintiff was induced by misrepresentations, made without fraud by the defendants, to become a partner with them in a business which was in fact insolvent. The business having failed with large liabilities, the plaintiff claimed a rescission of the contract and repayment of his capital, though the business which he restored to the defendants was worse than worthless; and it was held that he was entitled to the relief, and that the defendants could not recover against him for money lent and goods sold by them to the partnership. The House of Lords refrained from deciding whether the defendants were bound to indemnify the plaintiff against the general liabilities of the firm, and a declaration to that effect was struck out.

BANKER—PLEDGE—DEPOSIT BY MONEY DEALER OF CUSTOMER'S SECURITIES—PURCHASER FOR VALUE WITHOUT NOTICE—NOTICE OF INFIRMITY OF TITLE OF PLEDGOR.

Sheffield v. *London Joint Stock Bank*, 13 App. Cas. 333, is the case known as *Easton* v. *London Joint Stock Bank*, 34 Chy. D. 95, when before the Court of Appeal. This is another case in which a conflict arose between the rightful owner of shares and bonds, and a person to whom they had been transferred in fraud of the true

owner. Lord Sheffield, the true owner, gave to one Easton certificates of the shares, with transfers thereof, executed by him in blank, and also foreign bonds (alleged to be negotiable securities), for the purpose of raising £26,000. Mozley, a money dealer, advanced the money, and the securities were handed to him as security for the advance. Mozley then transferred these securities, with others, to various banks, as security for large loan accounts, the blanks in the transfers of the stock being filled in with the names of the banks' nominees. The banks in so dealing with Mozley either actually knew, or had reason to believe, that the securities did or might belong, not to Mozley, but to his customers. Mozley having become bankrupt, the bank sold some of Lord Sheffield's securities, and claimed to hold the proceeds and the unsold remainder, as security for all the debt due to them by Mozley. The House of Lords (reversing the decision of the Court of Appeal) held that though the banks had the legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of Mozley's authority, and this whether the securities were negotiable or not, and that upon payment to the banks of the money advanced by Mozley to Easton, Lord Sheffield was entitled to the value of such of the securities as had been sold, and to the remainder which were unsold.

PRACTICE—PETITION TO APPEAR IN FORMA PAUPERIS.

Bowie v. *Ailsa*, 13 App. Cas. 371, was an application for leave to appeal *in formâ pauperis*. The action was brought to have it declared that the plaintiff, as a member of the public, had a right of fishing in a certain tidal river flowing through land belonging to the defendant. It appeared that subscriptions had been taken up to assist the plaintiff in the litigation. The application was refused.

PATENT—INFRINGEMENT—DAMAGES.

The United Horse-Shoe & Nail Co. v. *Stewart*, 13 App. Cas. 401, was an action by the assignees of a patent for the manufacture of horse-shoe nails, to recover damages for the infringement of the patent. The plaintiffs did not grant licenses, but manufactured the nails themselves. It was admitted that the defendants had sold a number of boxes of nails manufactured in such a manner as to infringe the plaintiffs' patent. Under these circumstances the House of Lords came to the conclusion (reversing the court below) that to the extent to which the plaintiffs' trade was injured by the defendants' sales, they were entitled to substantial damages, and that the measure of damages was the amount of profit which they would have made if they had themselves effected such sales, deducting a fair percentage in respect of sales due to the particular exertions of the defendants, and that the mere possibility that the defendants might have manufactured and sold an equal quantity of similar nails without infringing the patent was no ground for reducing the damages to a nominal sum. Their Lordships, however, held that the fact that the plaintiffs had, in consequence of the defendants' unlawful competition, reduced the price of the nails which they had themselves sold, did not entitle them to recover as damages the profits they had lost by such reduction.

VOLUNTARY CONVEYANCE IRREVOCABLE—SUBSEQUENT PURCHASER UNDER EXECUTION—13 ELIZ. C. 5—27 ELIZ. C. 4.

The only remaining case to be noted is *Godfrey* v. *Poole*, 13 App. Cas. 497, a decision of the Judicial Committee on appeal from New South Wales. A debtor conveyed all his real estate to a trustee to sell and pay creditors, and as to any surplus, to pay the same to trustees for the debtor's wife for her separate use for life, and after her decease, in trust for their children in equal shares. The plaintiff subsequently became the purchaser under execution of the grantor's interest in part of the land comprised in the conveyance. Their Lordships held, affirming the court below, that the deed of conveyance was not revocable, in consequence of the ultimate trust for the wife and children; that it was not void as intended to delay or defeat creditors, under 13 Eliz. c. 5; nor was it void under 27 Eliz. c. 4; and the subsequent sale for value not being made by the voluntary grantor, there was no presumption that the prior grant was fraudulent.

TRUSTS.

During the past year a system of dark and mysterious combinations, known as "Trusts," have sprung up in the industrial and commercial world. They have increased rapidly and have excited the alarm of thinking men. Though many in number, they are one in type and purpose. As in business the trust is an upstart, so, in law, it is a nondescript. It is the combination of a few men who wield all the powers of a mighty corporation without being subject to the limitations or responsibilities of a corporation. They can limit production; cut off employment; lower wages; advance prices; control markets; stifle competition; establish monopoly. Producers, wage-earners and consumers, trade, business and the masses are at their mercy. Their power is unchecked by legal restraints or safeguards. They operate in secret and recognize no legal control or regulation. Their end is self enrichment. It is centralization of financial and commercial power without parallel or precedent. It is simply czarism in business.

The purpose of the "trust" is to make larger profits by decreasing cost, limiting production and increasing the price to the consumer. This it accomplishes by presenting to competitors the alternative of joining the "trust" or being crushed out. Its organization is intricate and subtle. It is an abnormal, unnatural and dangerous development; a sort of financial anaconda, which crushes the life out of the small dealer by driving him into bankruptcy, and then swallows his profits.

When we had slavery in this country, we objected to it on two grounds. First, that it was morally wrong; second that it divided the South into two classes—the rich and the aristocrats on the one hand, and the hopeless poor on the other. Slavery was opposed to the genius of our institutions, which declare

that every man shall have his chance, and that no man shall deprive him of that chance. We fought on many a bloody field until the principle of equality was vindicated; and now the South has entered on a new commercial life which is as much better than the old as gold is better than copper.

The new danger is from the North; and it is, if possible, more subtile and formidable than slavery ever was. When capitalists combine to control the market, they crowd scores of little fellows to the wall, in order to make their control more complete and kill the spirit of competition; the small dealer is doomed, and we are governed by a syndicate which squeezes tens of millions out of necessities.

Take the sugar trust for example. In October, 1887, most of the refineries, including all the New York and Jersey City refineries, four in Boston, one in Portland, two in New Orleans, and one in St. Louis, representing altogether eighty-five per cent of the sugar refining business, formed a combination or "trust." The remaining refineries, being two in San Francisco, two in Philadelphia, one in Boston, and one in St. Louis, representing, altogether, fifteen per cent. of the business, did not take part. The trust was not incorporated, but was called the Sugar Refineries Company. Each separate refiner was incorporated; all the stock of these corporations was turned over to trustees, and the trustees issued "trust certificates" in payment for the stock. This placed all the corporations, hence all the refineries, in the hands of trustees. The trustees could elect the directors of the corporations, and thus place themselves as trusted agents in charge. The trust certificates are largely "water," and their par value is three or four times greater than the par value of the stock held by trustees. The amount of trust certificates may be increased by a majority vote of the certificate holders. Twice has an increase been made already, and $45,000,000 of trust certificates are now out.

Since the trust was formed, the production of refined sugar has decreased. By order of the "Trust," two refineries in Boston have been closed, two in New York, two others have been temporarily shut down, and still others have had the production decreased one-fourth. Refined sugar has advanced in price from three-fourths to one cent a pound since the trust was formed. Refined sugar was worth in February, 1887, $5.93, but in February, 1888, was worth $6.88. The average price of granulated sugar in 1887, was six cents, but the average price during January, 1888, was seven and one-sixteenth cents.

Competition has practically disappeared. The San Francisco sugar rarely gets further east than the Missouri River, and never competes east of Chicago. The object of the "Trust" is frankly stated to be to "limit production."

As to the refined sugars, the trust regulates its own prices, because it is the only seller of that article. One importer of raw sugar is reported to have lost $15,000 and another has lost $16,000 on a single shipment. These losses as they accrue will produce bankruptcy and ruin among the entire class of importers. They are at the mercy of the "Trust," and it has already shown itself to be merciless. As to the refined sugar, it has proceeded with a singular and malicious perversity towards small wholesale buyers. It has a fixed maximum

wholesale price, from which it gives a trifling rebate to purchasers of 100 barrels, while the rebate to purchasers of over 1,000 barrels is quite liberal—that is, for a trust monopoly to concede to its customers. But at the best, the rise is fully one to two cents a pound. This amounts to from $20 to $40 a ton, and, as the consumption of the entire country is 2,800,000 tons a year, the profits of the colossal "combine" can be readily estimated.

The Standard Oil Trust, The American Cotton-seed Oil Trust, The Envelope Trust, The Glass Trust, The New York Meal Trust, The Brooklyn Warehouse Trust, The Milk Trust, The Oil Cloth Trust, The Sandstone Trust, The Pitch and Coal Tar Trust, are other examples that may be mentioned. These were investigated recently by a Committee appointed by the Legislature of New York. Other "Trusts" besides the abovementioned were unearthed, but not investigated. They include upholsterers' felt, lead, lead-pencils, cartridges and shells, watches and watch cases, clothes wringers, carpets, nails, undertakers and coffins, cordage, planes, brewers, silver plate, plated ware, steel rails and hog slaughterers. They are spreading, in fact, like a disease through the entire commercial system.

Having ascertained in a measure the extent of the evil, we naturally seek a remedy.

Turning to the common law, we find that it has been its policy to limit the time during which a person may lock up his personal property or real estate. In Pennsylvania, for example, trusts for the accumulation of rents and profits cannot be created for a longer term than the life or lives of any grantor or grantors, and the term of twenty-one years from the death of any such grantor; that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation; and all other trusts for accumulation are void in so far as these limits are exceeded.* It is well settled that merchandise, land and shares of stock, in fact every kind of valuable property, both real and personal, that can be assigned at law, may be the subject of a trust.† But each State, by its statutes, generally provides and narrows the time during which property may be tied up by a trust; and, if a trust is formed for a period longer than allowed by statute, the trust itself is void.‡ Accordingly, a modern "Trust," whose property consists of real estate in New York, would be void. But there are common-law decisions holding that personal property may be placed in trust for the purpose of carrying on business in the name and under the management of the trustees. In the case of *Holmes* v. *Mead*,§ the court said: "A trust in personal property, which is not in conflict with the statute regulating the accumulation of interest and protecting the suspension of absolute ownership in property of that character, is valid when the trustee is competent to take, and a trust is for a lawful purpose, well defined as to be capable of being specifically executed by the court. . . . Trusts of personal property are not affected by the statute of uses and trusts, which applies only to trusts in real property."

In *Gott* v. *Cook*‖ the court said: "The Revised Statutes have not attempted

* Washburn, Real Property, 684.

† Perry on Trusts, par. 67.

‡ Gerrard, Titles to Real Estate, 228.

§ 52 N. Y. 332 (1873).

‖ 7 Paige, 521.

to define the objects for which express trusts of personal property may be created, as they have done in relation to trusts of real estate. Such trusts, therefore, may be created for any purposes which are not illegal."

In *Power* v. *Cassidy*,* the court said: "The law does not limit or confine trusts to personal property, except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law."

Many of the States, including Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky and Vermont, have statutes expressly specifying the object for which a trust may be created.†

The recent decision in *Louisiana* v. *American Cotton-seed Oil Trust* held that where an Association of persons or an unincorporated joint stock company assume to act as a corporation, a suit will lie in the name of the State against such person or association, even though the corporate acts done are declared not to be done as a corporation, but as a commercial partnership or as a board of trustees,‡ but this view of the law would not be sustained in any of the other States; nor would it be sustained under the old common law of England. Unincorporated joint stock companies have existed for years and are common throughout all the other States.§

If the "Trust" is to be considered a corporation, the question arises whether a corporation thus incorporated in one State can do business in another. Each State pursues its own methods in regard to granting acts of incorporation; and, under the earlier decisions of the Supreme Court of the United States, a State that granted acts of incorporation only through its legislature, and presumably, after careful investigation of the membership of the proposed company, its means and its purposes, could protect itself from the companies that might get acts of incorporation under the general incorporation laws of another State, because the principle was maintained that a corporation created by one State could do business in another State only by grace of the latter State. This was the doctrine of the Supreme Court in 1876 in the case of the *Insurance Co.* v. *Doyle*.‖ In that case, the permission of the State of Wisconsin to a foreign insurance company to do business within its limits was withdrawn, because the insurance company removed its litigation from the State to the Federal courts. The Supreme courts held in this and a somewhat analogous case that also came from Wisconsin a year or two before (*Morse* v. *Insurance Co.*¶) that a State had no right to require that a company doing business within its territory should agree not to resort to the Federal courts; but it had a right to require every foreign corporation to take out a license as a condition of doing business; and that license the State may revoke at its pleasure for any reason. The court said: "As the State has a right to exclude such company, the means by which she

*79 N. Y. 602, 613 (1880); Buckland *v.* Buckland, 1 Keyes (N.Y.) 141 (1864).

†Stevenson's American Statute Law, par. 1703.

‡Ry. & Corp. L. J. 509.

§Cook, Stock & Stockholders, ch. 29.

‖94 U. S. 535.

¶20 Wall. 445.

causes such exclusion or the motives of her action are not the subject of judicial inquiry." The Wisconsin law having been held to be constitutional, Illinois enacted a similar law governing insurance companies chartered in other States. In the case of *Baron* v. *Burnside*,* the court held that the motive of the State in requiring a license to be taken out by a foreign corporation was a subject for judicial inquiry, and that if the requirement of a license was designed to afford the State the means of compelling foreign corporations to carry on their litigation in the State courts, the requirement was unconstitutional. This decision goes some way towards the position that a corporation, like an individual, has equal rights in all the States, and the corporation organized in West Virginia has the same rights in Illinois that an Illinois corporation has, with the added right of removing all suits brought against it into Federal courts. Still more recently, Justice Bradley, in the Circuit Court, in the Arthurkill Bridge case, used this language: "It is argued that corporations, as such, have no legal existence outside the State by whose laws they are created, and cannot transact business in another State except by the comity of its laws, which is not accorded in the present case."

The doctrine is subject to much qualification. Shortly after *Baron* v. *Burnside* was decided, a corporation was formed to absorb all the gas companies of Boston. A charter could not be obtained in Massachusetts, because the law of that State limited the capital of new gas companies to $500,000, probably for the very purpose of preventing such a combination. It is also probable that the legislature would have refused to charter a company organized to accomplish, in effect, a gas trust. Therefore the promoters of the scheme got a New York charter, though by the very nature of their enterprise, they could only transact business in Massachusets, and while the opinions of Supreme Court Judges are not yet decisive on the point, they lean strongly towards the position that a gas trust, organized in New York, to do business in Massachussetts, has every privilege in the latter State that a domestic corporation would have, and two besides, viz., the right to transfer all suits against it to the Federal courts, and the fact that the legislature of the State where it operates cannot touch its charter.

Trusts may be created for the purpose of doing business. They may be allowed to continue and exist as unincorporated companies; they may be organized in one State and do business all over the country, yet there can be no doubt that they are void on the ground of public policy. Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible; and is opposed to monopolies, which tend to advance the market prices to the injury of the general public.

In 1880, a voluntary association of salt manufacturers was formed in Ohio, for the purpose of selling and transporting that commodity. By articles of association, all salt manufactured or owned by the members, when packed in barrels, became the property of the company whose committee was authorized and required to regulate the price and grade thereof, and also to control the manner

*7 Sup. Ct. Rep. 931.

and time of receiving salt from the members; and each member was prohibited from selling any salt during the continuance of the association, except by retail at the factory, and at prices fixed by the company. It was held that such agreement was in restraint of trade and void, as against public policy.*

Five coal corporations of Pennsylvania entered into an agreement in New York to divide two coal regions, of which they had the control, to appoint a committee to take charge of their interests, which was to decide all questions and appoint a general agent at Watkins, N.Y., the coal mined to be delivered through him, each corporation to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct; the committee to adjust the prices, rates of freight, etc.; enter into agreements with anthracite companies; the five companies might sell their coal themselves only to the extent of their proportion, and at prices adjusted by the committee; the agent to suspend shipments by either beyond their proportion; frequent detailed reports to be made by companies, and settlements monthly by the committee; prices to be averaged and payments made to those in arrear by those in excess; neither to sell coal otherwise than as agreed upon, and the regulations of the committee to be carried out faithfully. A statute of New York makes it a misdemeanor "for persons to conspire to commit any acts injurious to trade or commerce." It was held that their agreement was in contravention of the statute, and also against public policy, and therefore illegal and void. The court said: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality, to wit: the combination resorted to by these five companies. Singly, each might have suspended deliveries and sales of coal, to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others; but here is a combination of all the companies operating in the Bloseburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise; or, if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron monster, and the fires of the manufacturer all feel the restraint; while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply, or a rise in the price of an article of such prime necessity cannot be estimated. It permeates the entire mass of the community, and it leaves few of its members untouched

* Cent. Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

by its withering blight. Such a combination is more than a contract; it is an offence. "I take it," said Gibson, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting to the power of the confederates, and giving effect to the purpose of the latter, whether extortion or mischief."* In *Rex* v. *De Berenquetal*, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumours. "The purpose itself," said Lord Ellenborough, "is mischievous; it strikes at the price of a valuable commodity in the market, and, if it gives a fictitious price, by means of false rumours, it is a fraud levelled against the public, for it is against all such as may possibly have anything to do with the funds on that particular day. Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price, and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe. Every association is criminal whose object is to raise or depress the price of labour beyond what it would bring if it were left without artificial aid or stimulus."†

An agreement was entered into by several commercial firms, by which they bound themselves for a term of three months not to sell any Indian cotton bagging, except with the consent of the majority of them. *Held*, that it was a combination to enhance the price of the artice, which is in restraint of trade, and contrary to public order, and that the agreement could not be enforced in a court of justice.‡

A contract entered into by the grain dealers of a town which, on its face, indicates that they have formed a partnership for the purpose of dealing in grain, but the true object of which is to form a secret combination, which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment at such town, is in restaint of trade, and, consequently, void on the ground of public policy.§ The proprietors of several lines of boats, engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement among themselves to run for the remainder of the season of navigation at certain rates for freight and passage then agreed upon, but which were to be changed whenever the parties should deem it expedient, and to divide the net earnings among themselves according to certain provisions fixed in the articles. In an action on the agreement, against a party who had failed to make

* Morris Run Coal Co. *v.* Barclay Coal Co., 68 Penn. 173; Commonwealth *v.* Carlisle, Brightly's Rep. 40.

† 3 M. & S. 67; 1 M. & S. 179; Commonwealth *v.* Hunt, 4 Metcalf, 111; 3 Whart. C. L.; People *v.* Fishbee, 14 Wend. 9.

‡ India Bagging Association *v.* B. Kock & Co., 14 La. Ann. 164 (1859). See, also, Blackstone's Comm., Book 4, chap. 22, par. 8-9; Chitty on Cont. (ed. 1855), p. 678; 1 Smith's L. C. 367, 381; French Penal Code, art. 419; Pardess. Droit Comm., vol. 1, p. 265; Lang *v.* Weeks, 2 O. (N. S.) 519; Thomas *v.* Files, 3 Ohio, 274.

§ Craft *v.* McConoughy, 79 Ill. 346 (1875).

payment, according to the contract; *Held*, that the agreement was a conspiracy to commit an act injurious to trade, contrary to 2 Rev. Stat. 691, s. 8, and was illegal and void.*

It has always been the policy of the common law to favour competition. Partnerships and corporations may have been infringements upon the old principles of the common law; but, because "trusts" are of the nature of corporations, and similar in many respects to partnerships, it does not necessarily follow that they should be allowed to succeed the former changes that have been made. Corporations, when properly controlled, are blessings to the country. They do not interfere with competition; but "trusts" tend directly to degrade the people whom it is their express object to enslave to the extent of forcing them to buy at prices which are not the natural prices, but are those artificially established and maintained by the trust.

But the extension of such combinations has a still more powerfully evil effect. A trust is a combination of capitalists to control the market.† To achieve its only object, it must, in the nature of things, crush opposition and check production. Unless the capitalists who have combined in a trust achieve these two things they have failed. Hence, we see in the rules of some of the trusts that have been exposed, one which forbids their customers to buy, except from the trust—even to import from abroad, or to buy imported goods is forbidden them—all on penalty of being denied the right to purchase from the trust, which means embarrassment, and often ruin.

Again, it is shown that the trust takes in upon a "watered" basis the factories of which it is formed, and guarantees to each a certain profit, conditioned upon its not producing more than the trust managers permit, and selling to no one except the favoured customers of the trust. When a trust has thus taken possession of the market, its first object is to crush all independent productions; and it is able to do this by underselling and ruining the independent competitor. It does not seek the best methods of production, because it controls the market; hence, the numerous instances in which such combines have bought up valuable patented improvements and locked them up, refusing to use them for the public benefit. But there is still a greater evil in the capitalistic combinations. They not only so cover the field that individual effort is paralyzed, but, in the pursuit of their monopoly, they buy the services of the ablest men—the brains of the country—and, by paying the large salaries and rewards which an established monopoly, and that alone, can afford, they suborn the intellect of the nation for their purposes. Thus, in these times, we see the ablest lawyers, the ablest chemists, the greatest inventors, the most ingenious mechanics, the most competent business managers, in the pay of great corporations, combinations and trusts, doing obediently the unscrupulous will of the aggregated and selfish capital which employs them. Thus we see growing in this country a great, unscrupulous, powerful plutocracy, banded together more and more closely, resisting, by the

* Hooker *v.* Vandewater, 4 Denio, 349.

† Louisinana *v.* American Cotton Oil Trust, 1 Ry. & Corp. L. J. 509.

help of its hired agents, every attempt to reform abuses and to re-establish liberty, crushing out opposition, more and more greedily grasping power, and bribing the best intellect of the country into its service.

A future, full of bad omens, stares us in the face, unless by wise and fearlessly executed legislation some check shall be put to these destroyers of the rights of mankind. This country has always been regarded as the zealous guarder of individual rights. When this splendid characteristic passes into history we shall be on the downward path, followed by so many republics, whose fall can clearly be traced to the dangers ever associated with the vast accumulations of wealth by the few at the expense of the rights of the countless masses of toiling humanity.—*Am. Law Review.*

Reviews and Notices of Books.

A Digest of the Reported Decisions in the Supreme Court of New Brunswick from Hilary Term, 42 Vict. 1879, to Easter Term, 49 Vict. 1886, with Digest of Cases in the Supreme Court of Canada decided on Appeal from the Supreme Court of New Brunswick, with Rules of Court from 1881 to 1886, in continuation of Stevens' Digest. By JAMES G. STEVENS, Q.C., one of the Judges of the County Courts of New Brunswick. Toronto: Carswell & Co.

It would be an improvement to have the cases decided by the Supreme Court classified under their respective heads in the body of the work, instead of being arranged separately in an appendix. In that way a single reference for any point to be investigated would suffice, whereas a double reference is now necessary. The arrangement of the topics seems excellent in other respects, and the head notes and cross references appear ample for enabling one to find the decisions affecting any matter he may wish information upon.

Lindley on Partnership. Vol. 2. From Blackstone Publishing Co., Philadelphia, U.S. Has just been received. This book is re-published from the fifth English edition. Also,

Ewart on Costs. Third Edition. Toronto: Carswell & Co., 1888; and

Index to the Consolidated Rules. By W. F. SUMMERHAYS. Toronto: Rowsell & Hutchinson, 1888.

DIARY FOR OCTOBER.

1. Mon....C.C. sittings for motions, except in York. Wm. D. Powell, 5th C.J. of Q.B. 1816.
2. Tues ...Co. Court non-jury sittings, except in York.
6. Sat.....Co. Court sittings for motions, except York, end.
7. Sun.....*19th Sunday after Trinity.* Henry Alcock, 3rd C.J. of Q.B. 1802.
8. Mon....Co. Court sittings for motions, in York, begin. R. A. Harrison, 11th C.J. of Q.B. 1875.
13. Sat.....Co. Court sittings for motions, in York, end. Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 92.
14. Sun.....*20th Sunday after Trinity.*
15. Mon....English Law introduced into Up. Canada, 1792.
18. Thur....St. Luke.
21. Sun.....*21st Sunday after Trinity.* Battle of Trafalgar, 1805.
23. Tues....Supreme Court of Canada sittings. Lord Lansdowne, G.G. 1883.
28. Sun.....*22nd Sunday after Trinity.* Simon and St. Jude.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

MacMahon, J.] [August 30.

REGINA *v.* COX.

Criminal law—Larceny Act, R. S. C. c. 164—*Information—Habeas corpus during remand on preliminary investigation—Bail—R. S. C. c.* 174, *s.* 83.

The information charged that the prisoner at a named time and place, "being a trustee of a sum of money . . . the property of the C. B. of C. (a corporate body) for the use of the said C. B. of C., did unlawfully, and with intent to defraud, convert and appropriate the same to his own use contrary to the statute in that behalf."

Held, that the prisoner was, by this information, charged with a criminal offence under the Larceny Act, R. S. C. c. 164.

Held, also, that a writ of *habeas corpus* should not issue where the accused is in custody pending a preliminary investigation before a magistrate during a remand to enable the prosecution to supply evidence in support of the charge.

Held, lastly, that a judge of the High Court has power under s. 83 of the Criminal Procedure Act, R. S. C. c. 174, to admit to bail in cases where the accused has not been finally committed for trial if he "think it right to do so;" but in this case, the charge being a serious one, the magistrate before whom the prisoner appeared having refused to admit him to bail, and no depositions having been taken, an order for bail was refused.

Badgerow, for the Crown.

Murdoch and *A. C. Galt*, for the prisoner.

Common Pleas Division.

Divisional Court.] [June 29.

REGINA *v.* TUCKER.

Canada Temperance Act—Conviction—Hard labour—Payment of Inspector's attendance and mileage.

In a conviction under the Canada Temperance Act there is no power to order imprisonment at hard labour.

Quære, whether there is power to order the defendant to pay a sum for two day's attendance of the inspector and his mileage.

A. F. C. Boulton, for defendant.

Aylesworth, contra.

Divisional Court.] [June 29.

LYDEN *v.* MCGEE.

False imprisonment—Reasonable and probable cause—Misdirection—Damages—Liability of corporation for act of agent.

Action of trespass for false imprisonment. The plaintiff was arrested, as was alleged, by direction of the defendant M., the treasurer of the defendant association. On being brought before the police magistrate the defendants did not appear to prosecute, when the police magistrate remanded the plaintiff, and subsequently dismissed the charge and discharged the plaintiff. At the trial the judge charged the jury that it was not necessary to inquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty was no excuse. If M. had laid an information it would have been different, but not having done so,

the only question was whether he gave the plaintiff into custody.

Held, misdirection; for the defendant M. was justified in ordering the plaintiff's arrest if a felony was committeed, and he had reasonable and probable cause to suspect that the plaintiff committed the felony.

Held, also, that the defendants could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings.

A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority.

Bigelow, for plaintiff.

Lount, Q.C., and *Mc Williams*, for defendant.

Divisional Court.] [June 29.

LANGMAID *v.* MEIKLE.

Free grant lands—Pine timber—Right to—Estoppel.

In 1871 S., under the Free Grant and Homestead Act, located certain lands in the Crown Lands Department, but never entered into possession or performed the settlement duties. The lot was located through B., the Crown Lands' Agent for the district. In 1883 S. sold the timber on the lot to B. In 1875, B wrote to the department asking if a cancellation and re-location would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a *bona fide* one and in accordance with the order in council, a re-location would not affect his claim. The order in council was that the department would recognize the right of all purchasers or locatees of free grant lands who had purchased or located any lot on or before the 30th September, 1871, and who on that day were in actual occupation of or resident on the lots located, to sell and dispose of all pine trees on the said lots. On the 10th Sept., 1875, S.'s location was cancelled for non-performance of the settlement duties; and on the 3rd July, 1876, the lot was re-located to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed and acted on this belief. On the 9th November, 1876 the patent issued to the plaintiff, and contained no mention of the pine trees. In 1883 B. sold the timber to the defendant, who in October, 1886, cut some, notwithstanding he was notified by the plaintiff to desist. The timber was removed by the defendant after the issue of the patent. In an action by the plaintiff to recover the value of the timber,

Held, that as the patent contained no mention of the pine trees standing or being on the land, and as the land was located prior to 43 Vict. c. 4, the trees "remaining on the land," at the time of the patent, passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. c. 24, s. 10, had no right to cut timber except for building, fencing and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 Vict. c. 23, for the locatee was not on or before the 30th September, 1871, "in actual occupation of or resident on the lots located;" and

Semble, that the words "remaining on the land," applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff, being in possession with the assent of the Crown, had title to the timber as against the defendant, a wrong-doer.

Held, also that the plaintiff was not estopped from bringing the action.

Mahaffy, for plaintiff.

T. D. Delamere, for defendant.

Divisional Court.] [June 29.

BANK OF COMMERCE *v.* JENKINS.

Banks and banking—Composition and discharge—Execution of deed by local manager—Validity—Agreement to accept part of claim—Authority—R. S. O. c. 44, s. 53, ss. 7.

At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an agreement was made to acept 40 cents on the amount of the claims. A deed of composition, with a covenant to accept the 40 cents, was prepared and was executed by C. N., the manager of the plaintiffs' branch at L. The execution was "for Bank of Commerce, C. Nicholson;" opposite to which was an ordinary seal. At the time C. N. executed the deed there were two creditors mentioned in the schedule who had not executed. On the 4th June, 1887, before either of these creditors

had executed, and before the composition notes had been tendered to C. N., he wrote to the defendant's solicitor withdrawing from the arrangement. The composition notes were subsequently tendered to C. N., but he refused to accept them. By the plaintiffs' Act of Incorporation the management of their affairs was to be by directors, who had authority to open branches and appoint the officers. The chief place of business was to be at T., where the corporate seal was kept.

Held, that the deed was not binding on the plaintiffs, not being under the corporate seal, nor under a signature or sign manual whereby they executed documents; and also the execution in question did not purport to be by the plaintiffs, but "for the bank;" apart, however, from the validity of the execution, C. N., on the evidence, had authority to agree to accept less than the whole of the claim, and did so agree, and the debtor performed his part by tendering the notes; and under R. S. O. (1887), c. 44, s. 53, ss. 7, the agreement was irrevocable.

Lash, Q.C., for plaintiffs.

Aylesworth, for defendant.

Divisional Court.] [June 29.

WESTERN CANADA LOAN CO. *v.* GARRISON.

Statute of Limitations—Witnessing mortgage covering lands in question—Ignorance of lands included—Effect of—Estoppel.

In 1870 the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, which pointed to the ownership in the defendant of the land, but whether by deed or will did not clearly appear, though apparently by the latter; and remained in possession for sixteen years. In 1876 the father executed a mortgage to the L. & C. Loan Co., which was witnessed by the defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs, also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by him.

Held, that the evidence showed that the defendant had been in exclusive possession of the land occupied by him for the statutory period, so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the L. & C. Co., and its subsequent registration, under the circumstances, did not by virtue of s. 78 of the Registry Act, R. S. O. (1877), c. 111, create an estoppel.

Lefroy, for plaintiffs.

Porter (of Belleville), for defendant.

Divisional Court.] [June 29.

NORTH BRITISH MERCANTILE INSURANCE CO. *v.* KEAN.

Principal and surety—Notice terminating liability—Bond applicable to present and future appointment.

In June, 1884, K. applied to the plaintiffs to be appointed their agent at O., and was informed that he must secure sureties, whereupon he applied to the defendants, who agreed to act for him, and executed a bond, reciting that K. had been appointed agent of the company at O. The bond was sent to the head office at M., but nothing was done until December, 1885, when, on K. writing to the head office he received a certificate appointing him agent. In September, 1884, in consequence of a disagreement between the defendants and K., they stated they wrote notifying the head office that they repudiated their suretyship, and, receiving no answer, assumed that the matter was at an end. In an action against the defendants as sureties for K.'s default,

Held, that the defendants were discharged by the notice given terminating their suretyship, and that the weight of evidence showed that both defendants had given notice and not one of them only, as found by the learned judge at the trial; but this was of no importance, for after the company had received notice from one of the sureties, they should have notified the other surety, more especially as no appointment had then been made.

Per ROSE, J., also, that no appointment having been made when the bond was executed, the sureties could not be made liable for default made months after, even if they had received notice of the subsequent appoint-

ment; for they contracted in respect of a present appointment, and not a future one at some indefinite time at the will of the company; but even if they could be made liable on notice, no such notice was given.

Peplar, for plaintiffs.

Kean, for defendant.

Divisional Court.] [June 29.

POTTS *v.* BOVINE.

Will—Cujus est solum ejus est usque ad cœlum —Rebuttable presumption—Occupation of adjoining occupant.

The maxim *cujus est solem ejus est usque ad cœlum* is not a presumption of law applicable in all cases and under all circumstances, but the presumption may be rebutted by circumstances existing at the date of the devise showing it was not to apply.

When, therefore, in a devise of land the boundaries, according to the above maxim, would include an edifice built upon a gangway, or right of way, but the circumstances existing at the date of the devise showed that it was not intended so to pass, but was to be part of an adjoining edifice, to which it was attached, and with which it was intended to be used, and was used; it was

Held, to pass under the devise of such adjoining edifice, described, in addition to its metes and bounds, as occupied by its then occupant.

Dickson, Q.C., and *Burdett*, for plaintiff.

Northrup, for defendant.

Divisional Court.] [June 29.

TYSON *v.* ABERCROMBIE

Chattel mortgage—Consideration—Parol evidence to vary.

A chattel mortgage of certain timber was expressed to be given in consideration of the payment of $300 to the mortgagor; all the covenants and provisoes being applicable to a money payment or default therein. The mortgagor's father was indebted to the plaintiff, the mortgagee, for goods, and the father desiring to get more goods, the plaintiff delivered further goods to him, amounting in all to $300, on receiving the mortgage security. The defendant gave parol evidence to show that prior to giving the chattel mortgage the mortgagor's father had sold the plaintiff the timber in question, which was cut off land belonging to the son, the mortgagor; that at the time of the request for the further advance, a portion of the timber had been delivered to the plaintiff; that he declined to make the further advance unless the delivery of the balance of the timber was secured; and that the mortgage was given as security therefor and not to secure repayment of the $300; that such balance had since been delivered; and it was urged that the mortgage was therefore discharged.

Held, that the parol evidence was inadmissible.

Reesor, Q.C., for plaintiff.

Masson, Q.C., for defendant.

Divisional Court.] [June 29.

CLARK *v.* HARVEY.

Mortgage—Short Forms Act—Power of sale without notice—Validity under Act—Entry prior to sale.

The power of sale contained in a mortgage purporting to be under the Short Forms Act, was "Provided that the mortgagee on default for one day, may, without any notice, enter on and lease or sell said lands."

Held, per GALT, C.J., at the trial, that this case was distinguished from *Re Gilchrist and Island*, 11 O. R. 537, as the sale there was by an assignee of the mortgagee, and not, as here, by the mortgagee himself; that under the power entry on the land was not necessary prior to sale.

On appeal to a Divisonal Court,

Held, per ROSE, J., that the power was operative under the Short Forms Act, and therefore the point as to entry was immaterial. *Re Gilchrist and Island* dissented from.

Per STREET, J.—The form was not operative; and the words, therefore, must be confined to their actual meaning apart from the statute; and that under its terms the power did not arise, or, at all events, could not be exercised until entry made on the land.

Osler, Q.C., and *Shepley*, for plaintiff.

Bain, Q.C., for defendant Fisken.

Moss, Q.C., and *A. C. Galt*, for defendant Harvey.

T. P. Galt, for defendant Barwick.

Divisional Court.] [June 29.

ROBINSON *v.* TOWN OF OWEN SOUND.

Building contract—Final certificate of engineer of completion of work—Necessity for—Condition precedent.

The plaintiff entered into a contract with the defendants for the construction of certain main sewers. The contract provided that the work and materials should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should on the first day of each month hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month, an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, etc. No final certificate was obtained from the engineer of the completion of the work, nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract,

Held, that the certificate of the engineer as to the completion of the work, was a condition precedent to the right to recover, and therefore the plaintiff must fail.

McCarthy, Q.C., and *Masson*, Q.C., for plaintiff.

Lash, Q.C., and *Reesor*, Q.C., for defendants.

Divisional Court.] [June 29.

GOWER *v.* LUSSE.

Malicious prosecution—Questions to jury Judgment on specific findings—Waiver of right to general verdict.

By ss. 263-4 of the C. L. P. Act, R. S. O. (1877), c. 50, except in certain actions, including malicious prosecution, the judge may require the jury to answer questions, and in such case the jury shall answer such questions, and shall not give any verdict; and by s. 252, the parties in person, or by their attorneys or counsel, may waive trial by jury.

In this case, which was malicious prosecution, the learned judge, without objection left certain questions to the jury, which they answered; but at the foot thereof wrote that their verdict was for the plaintiff. The learned judge disregarded the general verdict, and entered judgment on the answers to the questions for the defendant.

Held, that the learned judge acted properly: for the parties must be assumed to have waived their right to a general verdict, and assented to the learned judge entering judgment on the specific findings of fact; for if they can waive trial by jury altogether, there is no reason why they could not agree to the waiver as in this case.

The jury, therefore, in finding a general verdict, were doing what it was agreed they should not do, and what the parties had dispensed with their doing.

G. Lynch Staunton, for plaintiff.

J. W. Nesbitt, contra.

Divisional Court.] [June 29.

STILLMAN *v.* AGRICULTURAL INS. CO.

Insurance—Fire—Title—Fraud and false statement—1st and 15th statutory conditions—Threshing machine covered while in any outbuilding—Outbuildings insured in another company—Liability.

In an action on a fire insurance policy, application was made at the trial to set up the 1st statutory condition as a defence, in that a threshing machine insured as the plaintiff's own property was partnership property; and also to set up the 15th condition in that there was fraud and false statement, for the like reason in the proofs of loss.

Held, that the application must be refused: the 1st condition having no reference to title, and as to the 15th, the statement was not proved to be wilfully false and fradulent, and the fact that the threshing machine was partnership property was not material, no question as to title having been asked. Persons in possession of goods may insure them to their full value though not the actual owners.

The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn." The machine was in No. 2 barn, though the horse-power was outside. The plaintiff applied to the company, and an indorsement was made in the policy stating that

the machine should be covered "while in any one of the out-buildings insured." Barn No. 2 was insured, though not by the defendant company.

Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it.

An objection was also made that a reaper destroyed by the fire was not covered by the policy.

Held, on the evidence, that the objection was untenable.

Clute, for plaintiff.

Britton, Q.C., for defendant.

Divisional Court.] [June 29.

SWEENEY *v.* SWEENEY.

Maintenance, sum payable in lieu of—Payable at end of year—Consent judgment.

The plaintiff conveyed his farm to his son, subject to the payment of an annuity of $60 a year, and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of even date whereby the defendant covenanted to furnish such maintenance or pay such sum. The defendant sold the farm, and went to reside on a farm elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, etc., but, becoming dissatisfied, left.

Held, that the plaintiff was not bound to reside with the defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year.

At the trial the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The learned judge overruled the objection, and decided that the plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the learned judge acceded, and gave judgment accordingly.

Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it.

Leonard, for the plaintiff.

C. J. Holman, for defendant.

Chancery Division.

Robertson, J.] [July 15.

Costs—Increased counsel fees—Arbitration—Powers of taxing officer.

Item 153 of Tariff A, Con. Rules of Practice, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration, where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. (1887), c. 53, s. 24.

Middleton, for McKeen.

SUPREME COURT OF THE NORTH-WEST TERRITORIES.

[Reported for the CANADA LAW JOURNAL.]

Rouleau, J.]

REGINA *v.* WHITEBECK.

North-West Territories Act, R. S. C., c. 50, s. 90—Possessing intoxicating liquors without permission—Penalty—Permit to other person than defendant may cover liquor in possession of the latter.

The defendant was convicted for having intoxicating liquor in his possession without the written permission of the Lieutenant-Governor.

Robertson, J.] [July 24.

HORTON *v.* PROVINCIAL PROVIDENT INS.

Insurance—Certificate of membership—Default—Forfeiture—Waiver.

H., the husband of the plaintiff, was, in his life-time, the holder of two certificates in the defendant's company in his wife's favour, the condition of which required that the semi-annual dues should be paid on May 15th and November 15th in each year, and that thirty day's default should suspend membership and void the certificates; and that the suspended member should be reinstated only on furnishing a fresh medical examiner's report to the satisfaction of the defendants within ninety days from the date of suspension, and on paying all arrearages. The deceased died on

September 2nd, 1886. He failed to pay his dues May 15th, 1886, but on August 14th, 1886, he received from the defendants a de-

gineer of completion of work—Necessity for —Condition precedent.

The plaintiff entered into a contract with the defendants for the construction of certain main sewers. The contract provided that the work and materials should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should on the first day of each month hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month, an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, etc. No final certificate was obtained from the engineer of the completion of the work, nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract,

Held, that the certificate of the engineer as to the completion of the work, was a condition precedent to the right to recover, and therefore the plaintiff must fail.

McCarthy, Q.C., and *Masson*, Q.C., for plaintiff.

transfer—Appeal—Time.

1. An order under 49 Vict. c. 16, s. 12, for the examination of the transferee of a judgment debtor, should not be made without notice to the transferee, nor should an order under that section be made without proof that the transfer was made since the date when the liability of the judgment debtor was incurred.

2. If the original order is not shown at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it. *Meyers* v. *Kendrick*, 9. P. R., at p. 366, followed.

3. A chattel mortgage is a transfer of property and effects within the meaning of 49 Vict. c. 16, s. 12.

4. A transferee was allowed to appeal from an order for his examination after the time for appealing had expired, his delay being satisfactorily explained.

James Parkes, for the judgment creditor.

Masten, for the transferee.

MacMahon, J.] [August 10.

LEITCH *v.* GRAND TRUNK R. W. Co.

Discovery—Examination of officer of corporation—R. S O. (1877), *c.* 50, *s.* 156—*Ex parte order—Railway conductor—Discovery before second trial from witness examined at first trial.*

An order for the examination of a person as an officer of a corporation, under R. S. O. (1877), c. 50, s. 156, is properly made *ex parte*.

The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred, *held* examinable as an officer of the railway company, under such section.

A person called as a witness at the first trial of an action and cross-examined, can not be examined again, under such section, for discovery before a second trial.

Rae, for the plaintiff.

Hoyles, for the defendants.

Chy. Div. Court.] [Sept. 6.

CUERRIER *v.* WHITE.

Costs—Taxation—Appeal—Local taxing officers—Form of certificate or allocatur.

There is no need for local officers, when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they, as local officers, may also do), to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation and the full discharge of their functions as taxing officers when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole by their signature, which is a sufficient certificate or allocatur to show that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then *functi officiis*.

Remarks upon former practice at Law and Equity as to allocaturs and certificates of taxation.

Hoyles, for the plaintiff.

C. J. Holman, for the defendant.

Falconbridge, J.] [August 28.

MACKENZIE *v.* CARTER.

Affidavits—Date of filing—Statement in notice of motion.

Upon a motion to commit the defendants, the court refused to allow the plaintiffs to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice.

Masten, for the plaintiff.

Hoyles, for the defendant.

Osler, J. A.] [Sept. 13.

O'SULLIVAN *v.* LAKE.

Parties—Appeal—Relief over.

The plaintiff served notice of appeal from the judgment of the Common Pleas Division, 15 O. R. 544, upon both defendants, and furnished both with security for costs of appeal, but disclaimed any relief against the defendant B., and brought him before the court only that the defendant L. might obtain any relief over against B. that he might consider himself entitled to. L. claimed no relief against B. in his pleadings or reasons of appeal.

Held, that B. was not a person who would, or might be, affected by a reversal of the decision complained of, and there was no reason for retaining him before the court.

F. A. Anglin, for the plaintiff.

Aylesworth, for the defendant Balfour.

Court of Appeal.] [Sept. 14.

ROGERS *v.* WILSON.

Mortgagor and mortgagee—Assignment of mortgage to third person—49 Vict. c. 20, s. 7 (O.).

The judgment of ROSE, J., 12 P. R. 322, affirmed.

C. C. Robinson, for the appellant.

A. M. Taylor, for the respondent.

Boyd, C.] [Sept. 17.

In re MCKEEN AND TOWNSHIP OF SOUTH GOWER.

Costs—Increased counsel fees—Arbitration—Powers of taxing officer.

Item 153 of Tariff A, Con. Rules of Practice, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration, where there is no cause in court and a reference to a local officer to tax costs has been made under R. S. O. (1887), c. 53, s. 24.

Middleton, for McKeen.

SUPREME COURT OF THE NORTH-WEST TERRITORIES.

[Reported for the CANADA LAW JOURNAL.]

Rouleau, J.]

REGINA *v.* WHITEBECK.

North-West Territories Act, R. S. C., c. 50, s. 90—Possessing intoxicating liquors without permission—Penalty—Permit to other person than defendant may cover liquor in possession of the latter.

The defendant was convicted for having intoxicating liquor in his possession without the written permission of the Lieutenant-Governor, under sec. 95 of the North-West Territories Act.

On appeal, the appellant contended, 1st, that no penalty attached under this section for the offence stated in the conviction; and 2nd, that on its being shown that the liquor seized in the defendant's possession was covered by a permit, although such permit was in the name of a party other than the appellant, sec. 95, did not make such a possession an offence.

Sec. 95 reads as follows: "Every person who manufactures, makes, compounds, imports, sells, exchanges, trades or barters any intoxicating liquors or intoxicant, except by permission as aforesaid (that of the Lieutenant-Governor), or in whose possession or on whose premises *such* intoxicating liquor or intoxicant of any kind is or has been, shall incur a penalty," etc.

Held, that any liquor in respect to which a permit has been granted was exempt from seizure, and that no penalty attached to any one in whose possession it might be found, though such party was not the one in whose name the permit issued.

The court, therefore, quashed the conviction without deciding the first point raised, as it was not necessary to decide it.

Miscellaneous.

RULE OF COURT.

Wednesday, 17th Novemer, 1886.

Present:—The Hons. Adam Wilson, P.H. C.J.: J. A. Boyd, Chancellor; M. C. Cameron, C.J.C.P.D.; J. D. Armour, J., T. Ferguson, J.; J. E. Rose, J.

WHEREAS, by the Act passed in the 49th year of Her Majesty's reign, chaptered 49, and intituled, "An Act to make further provision respecting summary proceedings before Justices and other Magistrates."

It is enacted as follows:—

SEC. 8.—The second section of the Imperial Act, passed in the 5th year of the reign of His Majesty King George II., and chaptered 19, shall no longer apply to any conviction, order, or other proceeding by or before a justice of the peace in Canada, but the sixth section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under this Act, as might be had for enforcing the condition of a recognizance taken under the said Imperial Act.

It is therefore ordered, under the authority of the said section, and in pursuance of the terms of the sixth section of the said Act, that no motion shall be entertained by this court, or by any division of the same, or by any judge of a division sitting for the court, or in Chambers, to quash a conviction, order, or other proceeding which has been made by or before a justice of the peace [as defined by the said Act] and brought before the court by *certiorari*, unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a justice or justices of the county, or place, within which such conviction or order has been made, or before a judge of the County Court of the said county, or before a judge of the Superior Court, and which recognizance with an affidavit of the due execution thereof, shall be filed with the Registrar of the court in which such motion is made or is pending, or unless the defendant is shown to have made a deposit of the like sum of $100 with the Registrar of the court in which such motion is made, with or upon the condition that he will prosecute such *certiorari* at his own costs and charges and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the court in case such conviction, order, or proceeding is affirmed.

Certified,

M. B. JACKSON, *Acting Clerk.*

Appointments to Office.

POLICE MAGISTRATE.

Bruce.

John Bruce, of Walkerton, Police Magistrate in and for the town of Walkerton, without salary, *vice* Richard Vanstone, resigned.

DIVISION COURT CLERKS.

Lanark.

George McKinnon, of Smith's Falls, Clerk of the Fourth Division Court, *vice* W. M. Keith, resigned.

Stormont, Dundas, and Glengarry.

John A. McDougall, of Lochiel, Clerk of the Second Division Court, *vice* C. D. Chisholm, removed from office.

Middlesex.

C. G. Anderson, of Delaware, Clerk of the Fourth Division Court, *vice* C. J. Fox, resigned.

Prescott and Russell.

Telephore Rochon, of Clarence, Clerk of the Tenth Division Court, *vice* P. D. MacDonald, resigned.

DIVISION COURT BAILIFF.

Stormont, Dundas and Glengarry.

C. McLaurin, of Lochiel, Bailiff of the Second and Twelfth Division Courts, *vice* Samuel R. McLeod, removed from office.

The Canada Law Journal.

VOL. XXIV. OCTOBER 16, 1888. NO. 16.

IF any one will search the old law lexicons, he will find many writs with names unknown to modern practitioners. That some of these writs should have been disused and dropped does not seem at all strange, but that the days of the Judicature Act and The Consolidated Rules should produce a new writ not known to our forefathers, and one that might be supposed to issue only after the object of it had passed away beyond the reach of sheriffs and bailiffs, does seem strange.

A sheriff of a neighbouring county lately advised the solicitors that he had duly executed the writ of *Requiescat in pace* placed in his hands. Whether the consequence of the sheriff's action was that another had to "join the majority," deponent sayeth not. The *other* name of the writ was *de nocumento amovendo*.

THE recent decision of the Chancellor in *Harrison* v. *Spencer*, 15 O. R. 692, brings out the fact that there is no statute in force in this Province which prevents a testator from tying up his property, subject to trusts, for accumulation for an indefinite time. This power, it may be remembered, having been exercised in a somewhat extraordinary way in England, many years ago, by a gentleman of the name of Thellusson, gave rise to the passage by the Imperial Parliament of what is known as the Thellusson Act (39 & 40 Geo. III. c. 9), which restrains the power of testators in this respect within reasonable limits. The provisions of that Act, as the Chancellor points out, have never been introduced or re-enacted in this Province, and perhaps no great inconvenience has been so far felt for the want of some such Act. There is, however, no telling what disposition some eccentric millionaire may hereafter make of his wealth, and to prevent such eccentricities taking this particular form, we think it would be well if the Legislature were to adopt the provisions of the Thellusson Act without further delay.

PARTIES TO ACTIONS TO ENFORCE MECHANICS' LIENS.

AN important point of practice was recently brought before Ferguson, J., for decision in *Cole* v. *Hall*. The action was to enforce a mechanic's lien, and was commenced against the owner within the ninety days allowed by sec. 23 of the Mechanics' Lien Act for commencing the action; but after the lapse of the ninety days an order was made adding as a party in the Master's office one Rogers,

who had an execution in the sheriff's hands against the owner, which, at the commencement of the action, was subsequent to the plaintiff's lien. This order adding him as a party Rogers applied to set aside, on the ground that inasmuch as he had not been made a party to the action within the ninety days, the plaintiff's lien had, under sec. 23, ceased to exist as against him. Ferguson, J., dismissed the application with costs. The learned judge bases his judgment, as we understand it, on the ground that under sec. 29, a lienholder may enforce his claim in the High Court "according to the ordinary procedure of that court," and that, as the ordinary procedure of that court in suits to enforce liens on lands is to add subsequent incumbrancers as parties in the Master's office—that, therefore, in suits to enforce liens, it is proper to add subsequent incumbrancers in the Master's office. We are not sure that this chain of reasoning is altogether perfect. It appears to be faulty in failing to take into account, that in ordinary suits to enforce liens on lands, the time limit for bringing the action is much longer than that allowed for prosecuting mechanics' liens, and that, therefore, the question whether parties added in the Master's office are added in due time does not often arise. If it could be alleged that according "to the ordinary procedure" to enforce liens, an incumbrancer, as against whom the plaintiff's right is barred by the Statute of Limitations, may nevertheless be added as a party in the Master's office, provided the action was commenced against the original defendants before the statute had run out, then we think the reasoning of the learned judge would be satisfactory. But as we think it is quite clearly established by the cases that, "according to the ordinary procedure" of the court, an action is not to be deemed to be commenced against a party added in the Master's office until the order is made adding him, it appears to us to be open to doubt whether an action to enforce a mechanics' lien can be said to be duly instituted, as against a party who is not added until after the time limited by the Mechanics' Lien Act for bringing the action has expired. The Act requires "proceedings to be instituted to realize the claim," and the court has virtually said it is sufficient that the proceedings are instituted within the prescribed time as against some of the parties interested; as against parties interested as subsequent incumbrancers, the proceedings may be instituted after the lapse of the prescribed time. This appears to us to be introducing into the statute a provision which it does not contain. In Mr. Holmested's recent work on the Mechanics' Lien Act, the point is discussed by the author, and we see that he inclines to the opinion that the action ought to be commenced against all parties within the prescribed time. We understand that an appeal has been lodged against the decision of Ferguson, J., and we presume the point will be settled by the Court of Appeal ere long. In the meantime, solicitors will have to consider whether or not it would be the safer practice to add all parties interested (other than lienholders of the same class) as original defendants. In any case, the lienholder is at present in an unfortunate dilemma—if he does add subsequent incumbrancers as original defendants, and the decision of Ferguson, J., is upheld, he may be mulcted in the extra costs thus occasioned; and if he does not add them, and the decision of Ferguson, J., is reversed, he runs the risk of

finding his lien has altogether ceased as against such subsequent incumbrancers. In considering this point the cases of *McDonald* v. *Wright*, 14 Gr. 284; *Stirling* v. *Campbell*, 1 Chy. Ch. R. 147; *Shaw* v. *Cunningham*, 12 Gr. 101; *Jusan* v. *Gardiner*, 11 Gr. 23; *Dumble* v. *Larush*, 27 Gr. 187, and *Kline* v. *Kline*, 3 Chy. Ch. R. 161, may be referred to.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for September comprise 21 Q. B. D. pp. 309-348; 13 P. D. pp. 141-156; and 38 Chy. D. pp. 305-647.

ELECTION—NOMINATION PAPER—SIGNATURE OF ELECTORS—(R. S. C. c. 81, s. 21).

Bowden v. *Besley*, 21 Q. B. D. 309, is a decision of Manisty and Stephen, JJ., upon a special case stated to determine a question which arose under the Municipal Corporations Act, 1882, which provides that every candidate for the office of councillor must be nominated in writing, and that the writing must be subscribed by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. (See R. S. C. c. 8, s. 21.) A nomination paper was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite their names on the burgess roll being the same as those appearing opposite the signatures of the assenting burgesses on the nomination paper. The question for the court was whether the nomination paper had been duly subscribed, and the court decided that it had.

PRACTICE—SERVICE OUT OF THE JURISDICTION—PROPER PARTIES—ORD. 11, R. 1 (ONT. R. 271 *g.*).

Massey v. *Heynes*, 21 Q. B. D. 330, is a decision of the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.). By Ord. 11, r. 1 (Ont. R. 271 *g.*), service out of the jurisdiction of a writ of summons may be allowed on any person out of the jurisdiction who is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction. In this action the plaintiffs sued the defendants residing in London for breach of warranty of authority, and it appeared that these defendants had assumed, as agents for a foreign principal, to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority. Upon a motion to set aside an order allowing the plaintiff to issue a concurrent writ and serve notice thereof on the foreign principals, it was held by the Court of Appeal (affirming the Queen's Bench Divisional Court, Wills and Grantham, JJ.) that the order was properly made, as the foreign principals were "proper"

parties to the action. Lopes, L.J., at page 339, says: "At what time must it be determined whether a person is a 'proper party' to an action? Clearly, I think, at the time when the writ is issued. The words, 'an action properly brought against some other person,' evidently point to that. If both these parties were within the jurisdiction, it could not be contended that they were not both 'proper parties' to the action. As one of these is out of the jurisdiction, I see no reason why the rule should not apply."

"RIGHT OF BURIAL," WHAT INCLUDED IN—ERECTIONS ON GRAVE.

In *McGough* v. *The Lancaster Burial Board*, 21 Q. B. D. 323, the plaintiff had purchased from the defendants "the exclusive right of burial" in a grave space in their burial ground, and they granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath, and to protect it a glass shade covered with a wire frame. It was the general rule of the defendants never to allow the placing of such glass shades on the graves in their burial ground, and they accordingly removed the glass shade and wire frame without the consent of the plaintiff. By their Act of Incorporation the defendants were empowered to sell the exclusive right of burial, the right of constructing a vault or place of burial, and also the right of erecting any monument, gravestone, tablet or monumental inscription in such burial ground; and it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) that the plaintiff had only acquired such rights as under the Act the defendants were empowered to sell, and that such rights did not include a right to place the glass shade and wire covering on the grave, and that under a provision in the Act which vested the general management, regulation and control of the burial-ground in the defendants, they were entitled to remove the shade and wire frame.

DIVORCE—ADULTERY OF HUSBAND AND WIFE—CRUELTY—COSTS.

Otway v. *Otway*, 13 P. D. 142, is deserving of notice for the principles it lays down in regard to the granting of judicial separation. A petition was filed by the wife for divorce, and a cross-petition by the husband,—the wife, in addition to adultery, alleged cruelty as a ground. Both parties were found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated kind. While refusing to decree a divorce, Butt, J., the judge of first instance, granted the wife a judicial separation on the ground of cruelty, but the Court of Appeal (Cotton, Fry and Lopes L.JJ.) held that the wife, having been found guilty of adultery, had debarred herself from obtaining any relief, and the decree for judicial separation was therefore reversed. The marriage having taken place in 1879, the court held that, notwithstanding the wife's adultery, she was entitled to costs, both in the court below and of the Appeal, but they expressly guard themselves against being bound to come to the same conclusion in a case where the marriage has taken place since 1882. As to this point, Cotton, L.J., says at p. 156: "If a case comes before us where a woman has been married after the Act of 1882, it will be a very serious question for consideration how far we ought to follow the old rule, or what decision we ought to give."

TRUSTEE—BREACH OF TRUST—DUTY TO ENFORCE—PAYMENT OF TRUST FUNDS—ADMISSION OF ASSETS—PAYMENT OF LEGACY BY EXECUTORS DE BONIS PROPRIIS—RIGHT OF CREDITOR TO CALL ON LEGATEE TO REFUND.

The first case in the Chancery Division which it is necessary to notice is *In re Brogden*, *Billing* v. *Brogden*, 38 Chy. D. 546, in which the only point decided is that where a trustee neglects for a long period to take proceedings to recover the trust fund, he becomes personally liable to make it good, unless he can show clearly that the taking of proceedings to recover the fund would have been fruitless. In this case a trustee under a marriage settlement was entitled to £10,000 under a covenant made by a testator in his lifetime, and £10,000 as a legacy under the testator's will. These sums were not to be payable until five years after the testator's death,—applications were from time to time made for payment, but no legal proceedings were taken. The money was invested in a business in which the testator had been a partner, and which ultimately became insolvent. The trustee sought to exonerate himself from liability for the £10,000 legacy, on the ground that if the trust fund had been recovered by him he would have been liable to refund it to the unpaid creditors of the testator's estate. But Fry, L.J., says that if there had been a judgment against the executors *de bonis propriis* for the amount, the right of a creditor to recover would turn upon whether the money paid in pursuance of such a judgment was part of the assets of the testator. If it was, it could be recovered by creditors; but if it was not, it could not be so recovered. The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) affirmed the decision of North, J., holding the trustee liable personally for neglect to get in the fund. The point of the decision is well summed up in the judgment of Lopes, L.J., at p. 574, where he says: "Such a trustee, in my opinion, is bound at the expiration of the specified time to demand payment of the trust funds; and, if that demand is not complied with within a reasonable time, to take active measures to enforce its payment, and, if necessary, to institute legal proceedings. I know of nothing which would excuse the right of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated."

It will thus be seen that the responsibility of a trustee for the trust fund arises even before it actually comes to his hands, and that if he negligently fail to take the necessary steps to get it into his hands, he may become just as much liable for its loss as if he had actually received it and made away with it himself.

PATENT—ASSIGNMENT—IMPLIED COVENANT.

In re Railway and Electric Appliances Co., 38 Chy. D. 597, is a case in which Kay, J., had to consider the doctrine of implied covenants in deeds. Two gentlemen, Gilbert and Sinclair, were possessed of a patent which had been recently brought out, and in respect of which there were certain yearly payments

of £10 to be made for renewal fees in order to keep it on foot, and the omission to make one of these payments for three months would render the patent invalid. They assigned the patent, subject to the payment of a royalty, to the *Railway and Electric Appliances Co.* by deed, dated March 1st, 1883. The company by accident neglected to make the payments of the renewal fees, and the patent was forfeited; a subsequent ineffectual attempt was made to obtain a private Act to revive the patent. The company having gone into liquidation, Gilbert and Scott preferred a claim against the company for £2,000 for damages occasioned by the company's neglect to pay the renewal fees; and for the claimants it was contended that a covenant must be implied on the part of the company to keep the patent on foot. There being no such covenant expressed in the deed, and no words therein capable of being construed into such a covenant, Kay, J., came to the conclusion that none could be implied, that the assignors believing the patent to be a valuable one, and that the company would not neglect to keep it on foot, had been content to have that to be governed by the interest the company would have in keeping the patent on foot, without asking them to enter into any contract or covenant to that effect. He, therefore, held the claim for damages could not be maintained.

MORTAGOR AND MORTAGEE—EXECUTOR—DEVASTAVIT—STATUTE OF LIMITATIONS—TRUSTEES—RENTS AND PROFITS—ASSETS.

In re Hyatt, Bowles v. *Hyatt*, 38 Chy. D. 609, the facts were as follows: A testator mortgaged freeholds and died in May, 1867, having devised all his real and personal estate to A and B upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, of which they had notice, applied the whole of the personalty in payment to simple contract creditors and beneficiaries. In 1869 A died, and C was appointed trustee in his place in 1871. The rents of the real estate were received by A and B, and by B and C, and after payment of the interest on the mortgage, the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and the interest having fallen in arrears, the mortgagee commenced proceedings against B and C, under which accounts of the testator's personal estate received by A and B, or by B alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents received by B and C. In the accounts brought in by B and C, they claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries; and further, that as to such of the payments as were made by A and B upwards of six years prior to the action, any claim on a *devastavit* was statute barred, and that as to the rents and profits they were not liable to account for them at all. Chitty, J., however, held, following *In re Marsden*, 26 Chy. D. 783, that B could not set up his own and A's wrongful payment by way of *devastavit* as a defence in order to claim the benefit of the Statute of Limitations. And that as to the rents and profits which had been received by B, or by B and C jointly, that they were under 3 & 4 Wm. IV. c. 104, assets by accretion, liable under the circumstances for payment of specialty

creditors, just as much as the real estate was assets under that statute. With regard to the first point, Chitty, J., points out at pp. 615, 616, that an executor sued as executor cannot set up his own *devastavit*, and therefore claim the benefit of the Statute of Limitations, because both at law and in equity an executor is considered to hold still in his own hands assets which he has improperly paid away or wasted. But if the executor is sued as for a *devastavit*, he may in that case plead the Statute of Limitations as a defence, because in that case the plaintiff treats the executor as his own debtor by reason of his tort or wrong-doing, and in answer to such a claim the executor may set up the statute. This case would, therefore, seem to show that it is better not to sue an executor for a *devastavit* wherever there is a possibility of his pleading the statute.

CROWN—PREROGATIVE—EXECUTION FOR DEBT—DISTRESS.

Attorney-General v. *Leonard*, 38 Chy. D. 622, is another case (see *ante* p. 431) in which the claim of the Crown to priority of payment over other creditors came up, and it was held by Chitty, J., that the priority of the Crown is not limited to proceedings by extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completed by actual sale. In a recent case in our own court, *Clarkson* v. *The Attorney-General*, 15 O. R. 632, we see that Armour, C.J., intimates that this prerogative right of the Crown to priority has, in this province, been abrogated by R. S. O. c. 94. It may be that that statute has that effect, though we doubt very much whether it was the intention of its framers to do more than restrict the Crown's lien upon the lands of its debtors to instruments duly registered; or, in other words, to make the claims of the Crown upon the lands of its debtors subject to the provisions of the Registry Act.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—PAYMENT OUT OF MONEY IN COURT.

In *Stewart* v. *Fletcher*, 38 Chy. D. 627, Chitty, J., was called upon to determine what was the proper frame of an order directing the payment out of court of the income of a fund to which a married woman was entitled, but subject to a restraint against anticipation, and he settled the order by directing a clause to be inserted to the following effect: "The said Marian Stewart being restrained from anticipating such dividends during her coverture, they are not to be paid to any attorney, except upon an affidavit or statutory declaration by such attorney that he receives them on behalf, and for the use, of the said Marian Stewart, and not of any other person to whom she has assigned or purported to assign them."

GENERAL POWER OF APPOINTMENT—EXERCISE BY WILL—"CONTRARY INTENTION"—WILLS ACT, 1 VICT. C. 26, S. 27 (R. S. O. C. 109 S. 29).

In re Marsh, Mason v. *Thorne*, 38 Chy. D. 630, it was held by North, J., that when a marriage settlement made in 1840 reserved to the husband a general power of appointment by will, "expressly referring to this power or the subject

thereof," and the husband, by his will, dated 15 March, 1877 (not referring to the power), gave the residue of his property to trustees on trusts differing from those declared by the settlement in default of appointment,—that the power was exercised by the will; and that in ascertaining whether a testator has shown an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement made by himself, the will only can be looked at. The observations of Lord St. Leonards, in his book on "Powers," 8th ed., p. 806, to the effect that when the power is created by a testator himself, a different rule should prevail from that in the case when the power is created by a stranger, were dissented from.

POLICY—CANCELLATION WHEN IT MAY BE ORDERED.

In *Brooking* v. *Maudslay*, 38 Chy. D. 636, Stirling, J., held that although when a policy is liable to be completely avoided on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to order it to be delivered up to be cancelled; yet it has no jurisdiction to direct the cancellation of a policy, or to declare that there is no claim upon it, because of the existence of a good legal defence to any claim that may be made upon it. If there is danger of the evidence for the defence being lost, the remedy is not an action for cancellation, but an action to perpetuate testimony. The action which was for cancellation of the policy was, therefore, dismissed with costs.

Reviews and Notices of Books.

A Manual of Costs in the Supreme Court of Canada, High Court of Justice, Court of Appeal, County Courts, etc., with Forms of Bill of Costs under the Ontario Judicature Act. By JOHN S. EWART, Q.C. Toronto: Carswell & Co., 1888.

The second edition of this work was published in 1884. Since then extensive changes have been made, not only in the tariffs, but also in the practice, and that edition has in consequence come to be of little value. The present edition seeks to embody all the alterations and additions made necessary by the Consolidated Rules. It is, however, something more than a mere correction of the former edition to bring it down to date. Some alterations have been made in the plan of the work, and much new matter has been added. Besides the tariffs appended to the Consolidated Rules, we find here the tariff of fees payable under the Land Titles Act, the Divisional Court and Surrogate Court tariffs, the tariff of fees at the General Sessions, the Maritime Court tariff, and also the tariffs of the Supreme Court of Canada and the Exchequer Court. By the use of smaller type, the size of the book has been reduced, nothwithstanding the

increase in matter, but the print is clear and distinct, and we venture to say that no inconvenience will arise from the change of type. The editor has been assisted in the preparation of the book by Mr. R. S. Cassels, who not only aided in the preparation of the manuscript, but also revised it, and saw it through the press. To his suggestions are also due some of the changes in the plan of the work. The present edition will, we doubt not, be of even more value than the former one, a copy of which was looked upon as practically indispensable in every lawyer's office.

Index to the Consolidated Rules of Practice of the Supreme Court of Ontario. By WILLIAM FRANK SUMMERHAYS. Toronto: Rowsell & Hutchinson. Price $1.

Though the index appended to the Consolidated Rules is tolerably full, difficulty is often experienced in finding the Rule to which one wishes to refer. The re-numbering and re-arrangement of the Rules has made reference somewhat difficult, and it requires time to discover the full extent of the changes made by them. Our author seeks to facilitate reference by the preparation of a very full and complete index, comprising 88 pages, uniform in size with the Consolidated Rules. Each subject has been placed under every head to which it belongs, and both the page and the number of the rule are always given.

Text-Book Series. The Blackstone Publishing Co. have just issued a reprint of Vol. 1 of Mr. Evans' Treatise upon the Law of Principal and Agent in Contracts and Torts, with notes on American cases. This will be followed by Pollock on Contracts, which will conclude the second series. The third series commences December 1st, 1888.

Notes on Exchanges and Legal Scrap Book.

DISALLOWANCE IN QUEBEC.—A cloud of discussion has arisen upon the disallowance of the District Magistrates' Bill of last session, yet the principal point involved seems to be so clear as hardly to admit of any doubt. The Provincial Legislature may exclusively make laws in relation to the constitution, maintenance and organization of provincial courts. The Governor-General has the appointment of the judges of the superior, district and county courts. The District Magistrates' Act (subject to proclamation by lieutenant-governor-in-council) established a special court of record, and abolished the Circuit Court for the district of Montreal (in which Judges of the Superior Court have hitherto presided). But it went further, and provided for the appointment of the justices

composing the new court by the lieutenant-governor in council. In other words it divests the Superior Court of part of its jurisdiction, and the substituted judges are to be appointed by the lieutenant-governor in council. If by merely calling judges "magistrates," jurisdiction can be given up to $100 to persons appointed by the lieutenant-governor in council, similarly jurisdiction can be given to any amount to persons appointed in the same way, and the judges of the Superior Court might be left with nothing to do. So, too, the provincial Court of Appeal might be replaced by a new bench styled "magistrates sitting in appeal." The provision of the B. N. A. Act, giving the Governor-General the power to appoint judges, would thus be evaded and destroyed. But while the exercise of the veto power was necessarily called for by the manner of appointment prescribed in the Act, it would be a matter for regret if the assignment of the circuit work to special judges should not be carried out. The judges of the Superior Court, for the most part, desire to be relieved from circuit court work. It will in the end effect an economy in the administration of justice, for the judges appointed to the petty court need not be paid anything like the salaries assigned to judges of the higher courts. The only thing required to settle the difficulty is that the Bill be re-enacted, leaving the appointment of the judges in the proper hands.—*Legal News.*

CHATTEL MORTGAGES.—The Supreme Court of Indiana, in *The Muncie National Bank* v. *Brown*, reported in the *American Law Register*, held a chattel mortgage valid where a notary public had, for several years, been using a seal of his own, but, in attesting the certificate of acknowledgment to the chattel mortgage involved in this action, used a seal belonging to another person. The designs of the seal were somewhat different, one of them bearing the words, "Notary Public, Seal, Indiana," the other bearing the words, "Notary Public, Delaware Co., Ind." *Held*, that the certificate was not invalidated, and that the mortgage was entitled to be admitted to record. The mistake or wrong of a public officer, in placing a seal upon a certificate of acknowledgment, is not available under an answer of general denial, where the instrument is fair and perfect on its face. A mortgagee has a right to a personal judgment and to a decree establishing his lien, although the mortgaged property is in the hands of a receiver. A description of personal property, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient. Under the statutes of Indiana, fraud is a question of fact, and a chattel mortgage cannot, as matter of law, be adjudged fraudulent because it contains a provision authorizing the mortgagor to dispose of the property and account to the mortgagee. A plaintiff who takes a personal judgment for the amount of his debt, does not merge the mortgage nor lose his right to subsequently foreclose it; but he may, on a subsequent day of the term, take a decree foreclosing the mortgage. A creditor who accepts a second mortgage, which expressly recites that it is subject to a prior mortgage, is estopped to attack it on the ground that it was made to defraud creditors.

CONSPIRACY TO BOYCOTT.—The Virginia Court of Appeal, in *Crump* v. *Commonwealth*, concluded that a conspiracy to boycott is criminal. We gather the facts from the *Criminal Law Magazine*. The plaintiff in error was a member of the Richmond Typographical Union. This body sought by means of boycotting to break up the business of Baughman Bros., printers and stationers, and compel them to make their office a union office. For this purpose the plaintiff in error and the other members of the Typographical Union conspired together. They sent out circulars saying that the labour organizations had boycotted Baughman Bros., and formally notifying customers of that firm that the names of all who should persist in dealing with that firm after notice would be published weekly in the *Labour Herald*, in a black-list, and in their turn boycotted until they agreed to withdraw their patronage. The employees of the obnoxious office were mercilessly persecuted by the labour organ, which sought to prevent them obtaining board or shelter, and customers were black-listed. The community was flooded with notices to boycott Baughman Bros., and all their customers. On appeal it was contended that the indictment did not charge a conspiracy to do any unlawful act, or show that the means to be used in breaking up the business of the non-union firm was unlawful. The objection was overruled, and the conviction affirmed. Boycotting is held to be unlawfnl in Virginia. The judgment of Fauntleroy, J., reviews the English and American decisions affecting the question at issue with considerable fulness.

FALSE ECONOMY.—Occasionally the person who evades the clear duty of every man when in trouble about his property to consult a respectable solicitor finds that he has made an expensive mistake. An illustration of this has just been supplied by an exhibitor at the Anglo-Danish Exhibition, who had a dispute with the manager of the "space department" as to the amount of rent due at the close of the Exhibition. The exhibitor wanted his goods (show-cases, etc.) for exhibition elsewhere, but did not feel inclined to pay the full rent demanded, the Exhibition having been closed prematurely. The manager claiming a lien on the goods, the exhibitor went to a police court and invoked the aid of the sitting magistrate, who offered him a summons under section 40 of the Metropolitan Police Act, provided the value of the goods did not exceed £15. This offer the exhibitor, who was all impatience to have his property transferred from South Kensington to some remote venue in Wales, jumped at with celerity. Mark the result. The summons was heard, and on every question raised the magistrate was in favour of the complainant, who not only got an order for immediate delivery of his property, but a substantial sum for his costs. Charmed, no doubt, by Mr. D'Eyncourt's urbanity and celerity, the exhibitor went away triumphant, and forthwith appeared outside the ruins of the Exhibition with vans and horses to retake possession of his property, but to no purpose. To his horror he found that his adversary had outrun him in the race; for, when he returned next day to complain to his worship that the order of the court was set at nought, he discovered that the defendant had paid into court

the full value of the goods less the rent adjudged to be due, but plus the costs. It was in vain that he protested that he did not want the money, and only wanted his property. The answer was the production of the order made on the summons, which was in the common form, and gave the defendant his election. "I can do nothing more for you" was the valedictory remark of the learned magistrate, and the complainant had to content himself with the money in court, and went away to reflect on the danger of playing with edged tools. The words of the section are clear. "The order for delivery of the goods alleged to be detained without just cause may be absolute, or conditional on the performance of some act on the part of the claimant. But whatever the form of the order, the statute contemplates the contingency of a defendant's being unable or unwilling to obey, and provides against it by enacting that he shall forfeit to the party aggrieved the full value of such goods—not greater than £15." Clearly, a man who wants immediate possession of his property, and does not want its worth in cash, should not resort to the detention section of the Police Act. The exhibitor seems to have been fairly trapped.—*English Law Journal.*

FITNESS FOR HIS WORK.—At the convention of the American Bar Association at Saratoga Springs, in August last, the Hon. George Hoadley delivered a remarkably able and eloquent address, dealing with the baneful influence of exclusive devotion, in these modern days, to the common law. While the evils inseparable from a rigid adherence to the rules of law established in other ages, and in totally different surroundings, may be, in a large measure, overcome by the codification of the law, much will, undoubtedly, depend always upon the character and attainments of those entrusted with the practice of the law. Concerning the elevation of the legal profession, the learned lecturer gives no uncertain utterances: "There is no excuse for admitting to the practice of the law any man not adequately prepared for the work. Let law schools abound and private preceptors be treated as adjuncts. Require competent knowledge, not only of our own tongue, but also of the language which forms its basis; require a competent knowledge of the laws and systems of the great empire in which that language was in daily use; require a competent knowledge of the history of that empire, the development of its civilization, as well as of the nations speaking the English tongue, whose children we are. Widen the horizon of legal vision. Give to the lawyer before he becomes so pushed with the affairs of clients as to be debarred by the exigencies of life from study of all except the cases which happen to come to him; give to the legal student the amplest and fullest opportunities to survey, not merely the historical data which precede our age and are the basis of our system, but others which constitute the foundations of other civilizations worthy of being considered with our own. Wage implacable war against ignorance; forgive no man who attempts to come to the bar without an adequate equipment, derived not merely from study of the statutes and the laws of his own country, but from a general survey at least of those of other lands. Lift up the standard; increase the term of study, and be steadfast

in exacting from the student the bestowal of time and labour in study. Four things are required of all generations of American lawyers: integrity, industry, learning, faculty. The first and second of these are at the command of all; industry will bring learning, but God can only give power, faculty, genius. This seems to be allotted to every people and generation according, at least, to their deserts. We may, therefore, await the future in serene confidence that if by honest labour we do our part, He who giveth the increase, will not withhold from us and our successors that vital spark which shall animate our and their corporate work, and make it productive of blessings to generations."

BULKY REPORTS.—In regard to the practice of printing the arguments of counsel in volumes of reports the *Central Law Journal* makes the following noteworthy observations: "As to the arguments of counsel, we must confess that we cannot see upon what principle they ever were printed in books of reports. They are neither law nor facts, and the object of books of reports is to set forth what the court decides to be the law upon a given state of facts. They are not designed as illustrations of the manner in which great lawyers argue difficult questions, because the reports of appellate courts are not text-books of law schools, and sometimes the lawyers who argue the cases reported are great, and sometimes they are very insignificant; and sometimes the questions involved are of much importance, and sometimes of little moment. The arguments of counsel do not elucidate the law of the case, for the opposite sides neutralize each other. The statement of facts, if properly prepared by the court or reporter, indicates sufficiently the facts involved in the issue, and the opinion of the court applies the law to those facts. That is the lawsuit so far as it concerns any member of the profession, not an attorney of record in the cause. The only possible advantage we can see in the arguments of counsel, so profusely printed in many books of reports, is in the citation of authorities, which may probably be verified by some anxious inquirer into collateral issues, and lead him to valuable points in his own case. If, therefore, the argument of counsel should be excluded, we think the citations of authorities and a few lines indicating the points to which they are applicable might well be printed, but not one word of rhetoric or logic."

DYING DECLARATIONS.—The evidence on the strength of which the deathbed declaration of Eliza Schumacher was tendered in the case of *Regina* v. *Gloster*, tried lately at the Old Bailey, was very slight indeed. It was simply that the doctor who received it and attended her in her last moments asked her if she made it with the fear of death before her eyes, and that she replied in the affirmative. With all persons and at all times there is the expectation of death which may take the form of fear, and all that was added in the case in question was an expectation of death by the illness from which the patient suffered. If we accept the view of Lord Justice Lush in *Regina* v.

Jenkins, 38 Law J. Rep. M. C. 82, that "if the declarant thinks that he will die to-morrow that will not do," the evidence was obviously not enough; but most lawyers will agree with Mr. Justice Charles that the view of Mr. Justice Willes in *Regina* v. *Peel*, that death must be thought impending within a few hours, better expresses the true test. Lawyers will also agree that the evidence in this case clearly did not answer that test. One of the reasons given by Mr. Justice Byles for the scrupulous, almost superstitious, care necessary in accepting dying declarations—namely, that the prisoner was not present—was perhaps a little unfortunate, as likely to suggest that the presence of the prisoner might make them admissible. That is, however, not the test, which is solely and simply whether the state of mind of the declarant was such that he believed he was lying in the presence of imminent death. The other question of evidence raised was the admissibility of the statements of the deceased as to her physical condition, and Mr. Justice Charles carefully excluded anything which did not relate to her then present symptoms; and again it must be pointed out that the result would have been the same if the prisoner had been present, the principle being that statements of this kind stand on the same footing as physical facts like cries of pain.—*English Law Journal.*

MORTGAGEES AND INSURANCE POLICIES.—The *Albany Law Journal*, of the 8th ult., has a somewhat full examination of the law regarding the equitable lien of a mortgagee on insurance policies and insurance money. On the principle that equity considers that as done which should have been done, the covenant of a mortgagor to insure the buidings on the mortgaged premises for the security of the mortgagee, though the policy was neither issued nor assigned to him, gives him a lien on the insurance moneys. Among the American decisions on the point, there is but one adverse to this view. With this single exception, the whole weight of authority is in this direction. That the mortgage contains a provision authorizing the mortgagee to insure in case the mortgagor failed to do so, and the intention of the mortgagor in effecting the insurance, are wholly unimportant. It does not impair the lien that he does not intend to insure for the benefit of the mortgagee. In Massachusetts only has the contrary been decided, it having been held there in *Stearns* v. *Quincy Insurance Company*, 124 Mass. 61, that the intent of the mortgagor to insure for the benefit of the mortgagee is essential. All the other American decisions are adverse to this view. The equitable lien will not prevail as against the claims of another mortgagee who has secured the policy in his own name, and has had it assigned to himself. *Dunlop* v. *Avery*, 89 N. Y. 592, was a contest between two mortgagees. Each mortgage contained a covenant for insurance. The policy was taken out by the mortgagor, and was made payble to the second mortgagee. The basis of the decision was, that when the equities are equal, the legal title will prevail. It was argued that the first mortgage was notice to the second mortgagee of the first mortgagee's rights, and that he would, therefore, take subject to those rights; but the argu-

ment was held untenable. The weight of the decisions seems to be in favour of the view that a covenant to insure does not run with the land. The grantee of the mortgagor may insure without being bound by the covenant of the latter. The mortgagee acquires no lien upon the proceeds of the policy. This is the decision in *Reid* v. *McCrum*, 89 N. Y. 592. In *Nordyke* v. *Gery* (Ind.), 13 N. E. Rep. 683, the mortgagors had effected an insurance which was accepted by the mortgagee as a compliance with the covenant; and it was held that his failure to collect the money through the insolvency of the insurance company or other causes, does not give him a lien upon other insurance on the same property. But in this case the mortgagee had distinctly accepted the insurance as a compliance with the covenant. Several cases are cited in the article referred to, which show that the lien will attach to insurance existing at the time the mortgage is given. Numerous cases, also, maintain that in the absence of any agreement on the part of the morgagor to insure for the benefit of the mortgagee, the latter can lay no claim to the insurance money, but an oral agreement to that effect is sufficient.

THEFT OF LETTERS.—In *United States* v. *Denicke*, 36 Fed. Rep. 407, it was held that a decoy letter with a fictitious address, which therefore cannot be delivered, is not "intended to be conveyed by mail," within the meaning of the statute of embezzlement. Speer, J., said: "It seems to come most clearly within the decision of Judge Neuman in the case of *United States* v. *Rapp*, 30 Fed. Rep. 818. In that case a 'nixe'—that is, a letter addressed to a fictitious person, or to a place where there was no post-office—was placed in what is known as the 'nixe basket,' a receptacle for unmailable matter. This was to be forwarded to the dead-letter office. This was held by the court not to be mail matter within the meaning of sections of 5467, 5469, of the Revised Statutes. It was held distinctly not to be matter intended to be conveyed by mail, and Judge Neuman uses this language: 'I do not believe that under this section it can be held that the packet was intended to be conveyed by mail, when the proof in this case for the Government shows that there was no such intention. I must,' said the learned judge, 'construe the language of this criminal statute by a rule of law that is axiomatic, strictly in favour of the defendant. See *United States* v. *Whittier*, 5 Dill. 35, and cases cited. But considering it according to its fair and ordinary meaning, can the words 'mail matter' be held to include this package? I think not. And this last view of the matter, in my opinion, applies to both of these cases. As stated above, I think the whole of this law . . . refers to mail under the protection of the Government, or the postal authorities as such. I do not hold that what is called under the testimony in this case a 'decoy' or 'test' letter, or the contents thereof, might not, when regularly mailed, be the subject of embezzlement, and punishable under this section, but I think it should get into the mail in some of the ordinary ways provided by the postal authorities, and become fairly and reasonably part of the mail matter under the control of

the postal authorities.' A letter is a written or printed message. Now there can be no message to that which is not in existence. Besides, if the letter is intended to be conveyed by mail it must have a destination to which it can be conveyed. This letter had no such destination. In the cases cited by the district attorney the decoy letters were addressed to a real and genuine address, and were regularly mailed. No case was produced where a decoy letter to a fictitious, unreal address was considered as within the class that were intended to be conveyed by mail. In the English case of *Queen* v. *Gardner*, 1 Car. & K. 628, cited by Judge Neuman, the embezzlement of a decoy letter was held not stealing a post-letter within the statute; taking of the contents was held larceny. There is no charge in the indictment that the defendant took the contents of the letter. In the case of *Queen* v. *Rathbone*, 2 Moody Cr. Cas. 242, an inspector secretly put a letter prepared for the purpose, containing a sovereign, among some letters which a letter-carrier suspected of dishonesty was about to sort. The letter-carrier stole the sovereign. Mr. Baron Gurney held that he could not be convicted of stealing a post-letter, such letter not having been put in the post in the ordinary way, but was rightly convicted of larceny of the sovereign laid as the property of the Postmaster-General. This case was considered at a meeting of the judges at Michaelmas term, 1841, and they were unanimously of the opinion that there could be no conviction for stealing the post-letter, the statute only applying to letters sent in the ordinary way. It is observable that this letter had apparently a genuine address, and also that it was placed with the letters, all of which were in the custody of the post-office department, and which it was the duty of the carrier to sort. There can be no difference in principle between this case and Rapp's case. In both cases the letters were 'nixes,' that is, they were without mailable direction; in both cases they must have gone to the dead-letter office. This statute was not made in contemplation of letters of this character. It was made to protect the genuine mail intended to be conveyed from one person to another. It was made to protect the mail in which the people have an interest; not fictitious papers or packages fixed up like the 'nixe' in the case before Judge Neuman, or the 'nixe' in this case. A letter to be conveyed by mail must have a sender and a receiver; a a place from which it starts and a destination to which it can be conveyed. We can fully see, if this practice was permitted to stand as a part of the legalized methods of trials of this character, how very great injustice might be done. It would be possible for unscrupulous officers to prepare a trap which would convict any man, however innocent. The accused should at least have the privilege of showing, if he could, that the letter which he is charged to have embezzled reached its destination. If it has no destination, this method of defence is denied him."—*Albany Law Journal.*

DIARY FOR OCTOBER.

1. Mon....C.C. sittings for motions, except in York. Wm. D. Powell, 5th C.J. of Q.B. 1816.
2. Tues ...Co. Court non-jury sittings, except in York.
6. Sat.....Co. Court sittings for motions, except York, end.
7. Sun.....*19th Sunday after Trinity.* Henry Alcock, 3rd C.J. of Q.B. 1802.
8. Mon....Co. Court sittings for motions, in York, begin. R. A. Harrison, 11th C.J. of Q.B. 1875.
13. Sat.....Co. Court sittings for motions, in York, end. Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 92.
14. Sun.....*20th Sunday after Trinity.*
15. Mon....English Law introduced into Up. Canada, 1792.
18. Thur....St. Luke.
21. Sun.....*21st Sunday after Trinity.* Battle of Trafalgar, 1805.
23. Tues....Supreme Court of Canada sittings. Lord Lansdowne, G.G. 1883.
28. Sun.....*22nd Sunday after Trinity.* Simon and St. Jude.

Reports.

SURROGATE CASES.

[Reported for the CANADA LAW JOURNAL.]

SURROGATE COURT OF THE COUNTY OF YORK.

CONLIN *v.* CONLIN.

Cancellation of will, former will does not thereby revive—Declaration of intention and implication have no effect—R. S. O. c. 109, *s.* 24.

A. made a will in 1866. In 1876 he made a second will after the passing of the Wills Act, R. S. O. c. 109, which applied to all wills executed after the 1st day of January, 1874. The will of 1876 revoked the will of 1866. About 1880 A. caused the will of 1876 to be destroyed *animo cancellandi*, and expressing his intention to thereby revive the will of 1866, which was still in his possession,

Held, that no will made before 1st January, 1874, and revoked after that date, could be revived by any declaration of deceased or by implication, but that such revival must be effected by the observance of the formalities prescribed by sec. 24, cap. 109, R. S. O.

Held, that the deceased died intestate.

McCarthy, Q.C., for plaintiffs, who seek to establish will dated May 10th, 1866.

Lash, Q.C., for next of kin and administratrix.

Malone, for infants.

[MCDOUGALL, Co. J., Toronto, Oct. 5.

The facts fully appear in the judgment of

MCDOUGALL, SURR. J.—This is a surrogate issue tried at the February non-jury sittings of the County Court. The plaintiffs are suing to establish a will of their father, the late Patrick Conlin, alleged to have been executed by him on the 10th May, 1866, as his last will and testament. The will in question is produced in court, but has the signatures of the testator and the witnesses as well as the attestation clause torn off. About the year 1876, Patrick Conlin had a second will drawn; but it appears from the evidence that this will was destroyed by the testator's instructions, with the intention of cancelling it. The evidence further shows that the will of 1866 was in the testator's possession at the date of the destruction of the second will, and that he declared that this first will was the will which he intended should remain as his last will and testament.

Evidence was also given to throw some light upon the mutilation of the will of 1866. It appears that Patrick Conlin had a son John, who was dissipated, and who had been cut off by the will of 1866. It is apparent that the contents of this will were known in the family. John was in gaol at the date of his father's death for non-payment of a fine under a conviction for drunkenness. The fine was paid and he procured his liberty to attend his father's funeral. Evidence of a number of witnesses was given to show statements made by John to the effect that he had gained access to his father's papers, and deliberately torn off the signatures and seals, with a view to destroy his father's will, and so come in for a share of his father's estate, under the intestacy, which he thought would follow the destruction of the will. This statement or confession was sworn to as having been made shortly before his own death to his mother and sister. The same statement was also sworn to as having been made about the date of the funeral of his father, to his brother Philip Conlin. Two witnesses outside of the family were also called, who swore that John had made similar statements to them. These statements alleged to have been made by John to the various witnesses were strenuously objected to as being inadmissible, but I received the same (as I was trying the issue without a jury) subject to the objection.

Upon the view which, under the authorities, I am constrained to take of the law, it becomes unnecessary to discuss the question of the admissibility of these declarations of John. The important question to be decided is, Supposing the will of 1866 to be established as being duly executed by the testator, and supposing also the presumption that he had mutilated

the will himself with the intention of revoking it is also rebutted, could the will in any case be considered in law as the last will and testament of Patrick Conlin?

The execution of a second will in 1876 admittedly revoked the will of 1866. Did the destruction of the second will *animo cancellandi*, accompanied by declarations which showed that the testator supposed he had thereby revived the will of 1866, effect that purpose?

This point was not argued before me by counsel except by a mere reference to sec. 7 of the Wills Act, and no authorities on the point were submitted. I have carefully looked into the authorities, and I find the point expressly determined by several English cases.

In *Dickinson* v. *Swatman*, 4 Sw. & Tr. 205 (also reported), 6 Jur. N. S. 831 (30 L. J. P. 84), it was held under the English Wills Act 7 Wm. IV. and 1 Vict. c. 26, that where A. had made a will in 1826, and another in 1851 inconsistent with the former, the destruction of the latter with *animo cancellandi*, even when the act (as in this case) was accompanied by statements that the deceased intended thereby to revive the will of 1826, failed to do so. It was expressly held that a will could only be revived in the manner pointed out by 7 Wm. IV. and 1 Vict. c. 26, and not by declarations of the testator.

See also *Cutto* v. *Gilbert*, 9 Moore P. C. C. 131, which decided upon somewhat similar facts to those mentioned in the preceding case, that the deceased died intestate.

In the *Goods of Steele*, 1 L. R. P. & D. 575, decides that since the passage of the Wills Act, a will cannot be revived by implication. The sections of our own Wills Act are upon this point a transcript of the English statute, and these decisions fully cover the point in dispute.

To give effect to these decisions I must, therefore, find the issues herein in favour of the defendants, and find that the said will of Patrick Conlin, dated 10th May, 1866, is not his last will and testament, and that the said Patrick Conlin died intestate.

With reference to the question of costs, as the legal question upon which the case is now decided, was fully disposed of by the cases I have above referred to years before the litigation was commenced, I cannot allow them out of the estate. I therefore direct the plaintiffs to pay the costs of all the defendants.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

FOURTH DIVISION COURT OF THE COUNTY OF ONTARIO.

SMITH *v.* THE CORPORATION OF THE VILLAGE OF CANNINGTON.

Ditches and Watercourses Act — Right of engineer to recover fees — Parol evidence to vary written contract — Witness fees.

An engineer appointed under the Ditches and Watercourses Act is entitled to his fees, when the by-law appointing him is silent as to his rights, in case his award is set aside.

Parol evidence, inconsistent with the by-law of the corporation, of an agreement between members thereof and the engineer that no fees were to be charged by him in case of his award being set aside, is not admissible.

The Act applies to all municipalities, but *Semble*, its powers should not be put in force unless clearly applicable, or if to do so would be oppressive or inequitable, or if the benefits ensuing are out of proportion to the cost of the work.

[DARTNELL, J.J., Whitby.

The plaintiff was the engineer appointed by the defendants under the Ditches and Watercourses Act. He made an award in a certain matter under the Act, which award was set aside by the senior judge of the county, on the ground, chiefly, that the provisions of the Act did not apply to incorporated towns and villages. The by-law appointing the plaintiff was silent as to his remuneration. The plaintiff claimed for his services, and the defence set up was that there was an agreement between the plaintiff and the reeve that there should be no charge to the corporation in case this or any award made by the plaintiff should be set aside.

DARTNELL, J.J.—It is not disputed that the services performed by the defendant were rendered, and were so rendered under the by-law, or that the amount claimed ($40) was not excessive. The question for decision is whether there was any valid agreement under which the plaintiff is precluded from recovering the amount of his claim.

I think the evidence of such an agreement is inadmissible as contradicting or varying the written contract, which must be taken as the Act, the resolution of appointment and the by-law. The two latter were silent as to any conditional agreement. The defendants' soli-

citor, before entering upon the defence, asked the plaintiff whether there was any agreement between him and the council, or any member thereof, that in the event of his award being set aside or not sustained that he was not to receive any remuneration for his services. He emphatically denied that there was any such conversation or agreement.

Upon opening the defence, it was proposed to call the defendants' reeve, to contradict the plaintiff. I rejected this evidence, and further reflection bids me believe, rightly, on the grounds: (1) That the defendants, having asked the plaintiff his version of the defence on a matter not arising out of his examination in chief, were bound by his answer, and could not call witnesses to contradict him in that respect. (2) That in any case it was parol evidence to vary or contradict the contract in writing. (3) That no agreement with any members of a corporation would bind the corporation itself; and (4) That such agreement, even if properly proved, would be void as against public policy.

I was and am of opinion that the plaintiff is entitled to recover the amount claimed. As a guide in future applications, I feel constrained to say that I do not agree with the learned senior judge that the Act does not apply to incorporated towns and villages. I have already otherwise ruled in former cases, without any doubt; where so much of the outlying territory of such municipalities consists of farming and cultivated land, to so construe the Act would manifestly circumscribe its intent and usefulness. Section 2 of the Act enacts that every municipality shall appoint by by-law an engineer. This would be meaningless if towns and villages are without its scope.

It seems to me, however, that its provisions and powers should be exercised with discretion, and should not be applied to cases where oppression or inequity would be the result. In fact, I doubt much whether the Act would apply to the circumstances under which this award was made, being a case in which the applicant sought and succeeded in charging upon the owners of a large number of vacant village lots the cost of his own house or cellar drain, which was of benefit to him alone. At the most, he should simply have been saved from the consequences of trespass in its construction.

Judgment for the plaintiff for $40 and costs.

The plaintiff, on taxation, claimed, and was allowed by the clerk, his professional fee as surveyor for attendance at court. The defendants appealed.

DARTNELL, J.J.—He cannot be allowed the increased fee. He was at court not as a professional, skilled, or expert witness, but simply to prove his claim like any ordinary witness.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[June 14.

KLOEPFER *v.* GARDNER.

Assignment for benefit of creditors—Creditor disputing deed—Right to dividend thereafter.

Where a trader had assigned all his goods in trust for the benefit of his creditors, one of the creditors having obtained judgment against such assignor, seized some of the goods so assigned, and on the trial of an interpleader issue attacked the validity of the assignment. The deed being sustained.

Held, affirming the judgment of the Court of Appeal (14 Ont. App. R. 60), that such creditor was not debarred by the said proceedings from participating in the benefits of said assignment and receiving his dividend thereunder.

Appeal dismissed with costs.

McClellan, Q.C., for the appellant.

McCarthy, Q.C., for the respondent.

[June 14.

C. A. R. *v.* TOWNSHIP OF CAMBRIDGE.

Municipal by-law—Voting on Casting vote of returning officer—R. S. O. (1877) *c.* 174, *ss.* 152, 299.

Sec. 299 of c. 174 of the R. S. O. (1877), provides that in case of a vote being taken on a municipal by-law, the proceedings at the poll and for and incidental to the same and the purposes thereof, shall be the same, as nearly as may be, as at municipal elections, and all the provisions of secs. 116 to 169 inclusive of the Act, so far as the same are applicable, and except so far as is herein otherwise provided,

shall apply to the taking of votes at such poll, and to all matters incidental thereto.

And sec. 152, one of the sections relating to municipal elections so made applicable to the voting on a by-law, provides that "In case it appears upon the casting up of the votes as aforesaid, that two or more candidates have an equal number of votes, the clerk of the municipality, whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election."

Held, affirming the judgment of the Court of Appeal for Ontario (14 Ont. App. R. 299), that this section 152 is not applicable to the case of a vote on a by-law, and the returning officer in case of a tie on such voting cannot give his vote in favour of the by-law.

Appeal dismissed with costs.

Chrysler, for the appellant.

O'Gara, Q.C., for the respondents.

[June 14.

BICKFORD *v.* CANADA SOUTHERN RAILWAY.

Contract for hire—Rolling stock—Agreement to purchase railway—Appeal.

B., the contractor for building the E. & H. Railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. Railway when built. While the negotiations were pending, B. went to California, and the agent, who looked after the affairs of the E. & H. Railway in his absence, applied to the manager of the C. S. R. for some rolling stock to assist in its construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road, which was communicated to B., who wrote a letter to the manager, in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars, and any other assistance or advantage you may have given Mr. Farquier, the agent."

The negotiations for the purchase of B.'s railway by the C. S. R. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway for the hire of the rolling stock, which was resisted by B. on two grounds: one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of B.; and the other, that if the plaintiffs had any right of action, it was only against the E. and H. Railway, and not against him.

By consent of the parties, the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O c. 50, s. 189.

The arbitrator gave an award in favour of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits, but upheld the award; the defendants then appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal, that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

Appeal dismissed with costs.

McCarthy, Q.C., and *Nesbitt*, for appellants.

Cattanach, for respondents.

[June 14.

HARVEY *v.* BANK OF HAMILTON.

Promissory note—Non-negotiable—Liability of maker.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Hamilton Bank, who discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due, he had, in writing, acknowledged his liability on it. In an action on the note by the Hamilton Bank against H.,

Held, affirming the judgment of the Court of Appeal, that although, in fact, the note was not negotiable, the bank, in equity, was entitled

to recover, it being shown that the note was intended by the makers to have been made negotiable, and was issued by them as such, but by mistake or inadvertence, it was not expressed to be payable to the order of the payee,

Appeal dismissed with costs.

McCarthy Q.C., and *Muir*, for the appellants.

Robinson, Q.C., and *E. Martin* for the respondents.

DOWNIE *v.* THE QUEEN.

Criminal appeal—Indictment for perjury—Evidence of special facts—Admissibility of.

D., in answering *faits et articles*, on the contestation of a *saisie-arrêt* or attachment, stated among other things: 1st, That he, D., owed nothing for his board; 2nd, that he, D., from about the beginning of 1880 to toward the end of the year 1881, had paid the board of one Francis, the rent of his room, and furnished him with all the necessaries of life with scarcely any exception; 3rd, that he, Francis, during all that time, 1880 and 1881, had no means of support whatever.

Being charged with perjury, in the assignments of perjury, and in the negative averments, the words used by D., in his answers, were distinctly negatived in the terms in which they were made.

At the trial, evidence was adduced and not objected to at the time by D. to prove that he, Francis, had paid to Downie in May or June, 1880, $42.00 for having boarded at his house in the month of May, 1880; that he had paid his board to Madam Duperrousel, and a part of his board to Francis Larin, and was held liable by the latter for part of his board during the months of September and October, 1880; that he was also held liable for part of his board at Mrs. Radford's during the months of January, February and March, 1881, and by Britain for having boarded at the Victoria Hotel in the months of April, May, June, July and August, 1881; and also, that he, D., had recieved from Francis an order on Benjamin Clements for $15, on account of which Clement had paid him, D., $7.50 in November 1880.

Held, that under the general terms of the negative averments of the assignment, it was competent for the prosecution to prove such special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and therefore the conviction could not be set aside.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Hall, Q.C., for respondent.

THE CANADIAN PACIFIC RAILWAY *v.* CHALIFOUX.

Railway companies—As carriers of passengers—Measure of obligation as to latent defects—Arts. 1053-1675—*C. C. P. Q.*

Held, reversing the judgments of the courts below, that where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissenting on the ground that as the accident was caused by a latent defect in the rail in use, the company was responsible.

Appeal allowed with costs.

Abbott, Q.C., for appellants.

Geoffrion, Q.C., for respondent.

FORSYTH *v.* BURY.

Judgment in licitation—Binding on parties to it—Constitutionality of an Act of Incorporation—When its validity can be questioned, and by whom.

The Island of Anticosti held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to respondent (plaintiff) $16,578.66 for his share as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth.

The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by Mrs. C. Langan through her attorney, W.

L. F., of said one-sixth to the Anticosti Compang was a nullity, because the Act incorporating the Island of Anticosti was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself as representing the Anticosti Company, was not valid.

The Anticosti Company was one of the defendants in the action for licitation and the appellant an intervening party; no proceedings were taken by respondent prior to judgment attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff now respondent.

Held, affirming the judgment of the court below, Sir W. J. RITCHIE, C.J., and GWYNNE, J., dissenting, that as the said Dame C. Langan had herself recognised the existence of the Company and as the appellant, the legal representative of Dame C. Langan, was a party in the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the Company, and was estopped from claiming the right of setting aside a deed of sale for which her mother had received good and valuable consideration.

Kerr, Q.C., for appellant.

Laflamme, Q.C., and *David*, for respondent.

Appeal dismissed with costs.

Application for leave to appeal to the Privy Council was refused. See *Canada Gazette*, Vol. II., p. 418.

DEDRICK *v.* ASHDOWN.

Chattel mortgage Power of sale—Exercise of possession of goods by mortgagor—Implied covenant for Covenant not to sell goods—Ordinary course of business.

D., a trader, being indebted to A., gave him a chattel mortgage of all his stock-in-trade and business effects. The mortgage contained a clause, among others, to the effect that if the mortgagor should attempt to sell or dispose of, or in any way part with the possession of the said goods and chattels, or to remove the same from his business premises, the mortgagee might take possession of and sell them, as in case of default in payment.

After the mortgage had been given and registered, A. obtained judgment in a suit previously begun against D., and issued an execution, under which the sheriff seized and sold the goods covered by the mortgage. The execution, was set aside by the court as being issued against good faith, and D. brought an action of trespass, with a count in trover, against A. for the wrongful seizure and conversion of his goods. Upon the pleas of not guilty and not possessed, the defendant in such action attempted to justify his entry and seizure of the goods under the chattel mortgage, alleging a breach of the covenant not to sell.

Held, 1. That the terms of the chattel mortgage implied an agreement that the mortgagor was to remain in possession of the goods mortgaged until default, there being no express provision to the contrary.

Held, 2. That selling or disposing of the goods as in the above provision only meant sales other than in the ordinary course of business.

Held, 3. That the defendants acted in the seizure and sale of the goods only under the execution, and could not justify for the wrongful seizure under the mortgage when the mortgagor was guilty of no default.

Judgment of court below (4 Man. L. R. 139 reversed.

Appeal allowed with costs.

Ewart, Q.C., for appellant.

Robinson, Q.C., for respondent.

[June 14.

MERCHANTS' MARINE INSURANCE CO. *v.* BARSS.

Marine insurance—Interest insured—Not disclosed when policy issued—Right to claim on—Notice of abandonment—Authority to give.

B. & Co., part owners of the barque L., cabled to V., managing owner at St. John, N.B., "Insure hull . . . on our account." The application made by V. stated that "insurance is wanted by H. B. & Co., on account of themselves," and the policy issued thereon insured the barque "on account of whom it may concern." The barque being lost, notice of abandonment was given to the insurers by V., on account of B. & Co., V. having no special authority to give such notice, B. & Co.,

who owned eight shares in the barque, claimed the insurance on behalf of themselves and other owners whom they represented, being twenty shares in all.

Held, that the insurers were not relieved on account of the value insured not being disclosed at the time of effecting the insurance.

Held, also, that V. had authority to give the notice of abandonment under his authority to insure.

Appeal dismissed with costs.

Weldon, Q.C., and *C. A. Palmer*, for the appellants.

J. G. Forbes, for the respondents.

[June 14.

JOHN *v.* THE QUEEN.

Criminal law — Rape — Indictment—Conviction for assault with intent to commit.

An indictment for rape charged the prisoner "violently and feloniously did make an assault on her, the said R., then violently and against her will, feloniously did ravish and carnally know against the form," etc.

Held, affirming the judgment of the court below on writ of error, that on this indictment the prisoner could be convicted of assault with intent to commit rape.

Appeal dismissed with costs.

Robinson, Q.C., for the appellant.

Dr. McMichael, Q.C., for the respondent

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

MEAD *v.* O'KEEFE.

Partnership — Dissolution — Expulsion of members of firm—Good-will, right to purchase-money paid for.

J. H. M. entered into partnership with the defendant in the business of maltsters and brewers, contributing the sum of $14,071.80, as his share of the capital stock; and he and the defendant H., each paid to the defendant, O'K., $12,500 for his good-will in the business.

One of the stipulations in the partnership articles was (No. 3) to the effect that any of the partners improperly dealing with the moneys or assets of the partnership should be liable to expulsion from the firm by a simple notice from the others or other of them to the effect that the partnership was at an end, in which case the partner so acting improperly should not have any claim for good-will in the partnership.

It was clearly shown that J. H. M., during the period which the partnership had been in existence (about seventeen months), had been in the habit of lending the funds of the firm to his friends, and otherwise so improperly dealing therewith as to have fully justified his partners in giving notice expelling him from the partnership. Instead of doing so, however, they verbally notified him that their partnership must cease, and then with him signed a notice, which was duly published, that the partnership was dissolved by mutual consent.

J. H. M. at the same time executed a transfer of all his interest in the partnership business to his mother, the plaintiff, and she sued for the price paid by him to O'K. for the good-will.

The Common Pleas Division (CAMERON, C.J., dissenting) held the plaintiff entitled to recover the sum so paid; and an appeal from such finding was, owing to an equal division of the judges of this court, dismissed with costs.

Per HAGARTY, C.J.O., and Osler, J.A., (while agreeing with the other members of the court that the dissolution had not been effected by the explusion of J. H. M. under the 3rd clause), the most plaintiff is entitled to is a reference to inquire what was the value of the good-will of J. H. M. in the partnership.

HIGH COURT OF JUSTICE FOR ONTARIO.

Practice.

Mr. Dalton.] [Sept. 14.

OLDFIELD *v.* BARBOUR.

Mechanics' lien— One lien against two owners —Joinder of parties- Summary application in action.

Four mechanics worked with a contractor for wages upon two buildings owned by differ-

ent persons, and each registered a lien for his services on both the buildings against the contractor and against both the properties on which they worked, and against both the owners, each lien being for the amount of the whole wages claimed in respect of service as to both properties All four joined in one action against the contractor and the two owners to enforce their liens.

Upon a summary application by the contractor the mechanics' liens and writ of summons were set aside.

Allan McNabb, for the plaintiff.

W. Davidson, for the defendant Barbour.

Boyd, C.] [Sept. 19.

DONEGAN *v.* SHORT.

Arrest—Ca. re.—Breach of promise—Statement of damage—Corroboration—Discharge of defendant.

In an action for breach of promise of marriage the defendant was arrested under a *ca. re.*, the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of his marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the province.

Held, that under these circumstances the defendant should be discharged, and the bail bond delivered up to be cancelled.

Middleton, for the plaintiff.

W. M. Douglas, for the defendant.

Armour, C. J.] [Sept. 20.

Re ONTARIO FARMERS' SUPPLY CO. AND ONTARIO AND QUEBEC R. W. C.

Railway—Land—Time—51 Vict. c. 29, s. 164 (D.).

In the computation of the ten days' previous notice necessary to be given under 51 Vict. c. 29, s. 164 (D.), to obtain a warrant for the possession of lands by a railway company, the day of the service of the notice, and the day upon which the application for the warrant is made, must both be excluded.

McMurchy, for the applicant.

S. M. Jarvis, contra.

Armour, C. J.] [Sept. 21.

WATERHOUSE *v.* MCVEIGH.

Arrest—Order for ca. sa.—Powers of County Court judge—Power of judge in court to rescind order.

The judge of a County Court has no power, either as such judge or as local judge of the High Court, to order the issue of a *ca. sa.* in an action of the High Court.

Cochrane Manufacturing Co. v. *Lamon*, 11 P. R. 351, followed.

A judge of the High Court, sitting in "single court," has power to set aside an order of a county judge for a *ca. sa.*

J. A. McCarthy, for the plaintiff.

Hewson and *Plaxton*, for the defendant.

Rose, J.] [Sept. 21.

COLTER *v.* MCPHERSON.

Discovery — Malicious prosecution — Investigation of transactions between plaintiff and a third person—Action for damages.

The statement of claim set out two causes of action.

1. Falsely and maliciously, and without reasonable and probable cause preferring a charge of perjury.

2. Falsely, etc., preferring a charge of obtaining a valuable security by false pretences.

The defence averred that the plaintiff and one Jones conspired together to obtain two promissory notes from defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood, induced him to enter into a contract to purchase certain hayforks, and that Jones followed him in course of time in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes.

Held, that upon examination of the plaintiff for discovery, the defendant should be per-

mitted to inquire into the dealings between the plaintiff and Jones fully and freely to ascertain whether Jones and the plaintiff were acting in concert, and whether any false pretence made by Jones was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by plaintiff or Jones or either of them under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill-books and all other books relating to such transaction.

Osler, Q.C., for the plaintiff.

Ermatinger, Q.C., for the defendant.

Mr. Dalton.] [Sept. 22.

BRODERICK *v.* BROATCH.

Notice of trial—Service of before defence filed —Irregularity.

Where the statement of defence was filed on the last day for giving notice of trial for the Belleville Assizes, and a joinder of issue and jury notice were filed on the same day, but after the filing of the defence.

Held, that the service of notice of trial with the joinder and jury notice, on the same day before the filing of the defence, was not an irregularity.

Affirmed by ARMOUR, C.J., September 25th.

Mahoney, for the plaintiff.

W. H. Blake, for the defendant.

Ferguson, J.] [Sept. 24.

COLE *v.* HALL.

Mechanics' lien—Priority—Execution creditor —Con. Rule 127.

The plaintiff registered a mechanics' lien on the 29th October, 1887, and commenced his action to enforce it on the 30th November, 1887.

Judgment was obtained on the 14th May, 1888, and on the reference therein ordered, the Master in Ordinary by an order of the 21st August, 1888, made one Rogers, an execution creditor whose writ had been placed in the sheriff's hands on the 3rd November, 1887, a party defendant in his office as a subsequent incumbrancer. On appeal by Rogers under Con. Rule 127,

Held, that the plaintiff's claim was prior to that of Rogers.

C. Millar, for Rogers.

Hoyles, for the plaintiff.

Ferguson, J.] [Sept. 26.

EDWARDS *v.* EDWARDS.

Costs, security for—Garnishing matter—Evidence of residence out of jurisdiction.

In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor,

Held, that there was power to order security for costs; but

Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode, was not sufficient evidence of his living out of the jurisdiction to support an order for security for costs.

E. R. Cameron, for the judgment creditor.

Shepley, for the garnishees.

Law Students' Department.

THE following papers were set at the Law Society Examination before Trinity Term, 1888.

FIRST INTERMEDIATE.

REAL PROPERTY.

1. What was the decision in Taltarum's case, and what was its effect?

2. What is the difference between a term of years and an estate in fee simple? Explain fully.

3. How was a mortgage regarded at common law, and how in equity? Is there any difference now? Why?

4. What is the rule in Shelley's case? Give an example of its application.

5. For how long a period must a vendor of land show title?

6. What is an estate tail?

7. What is meant by an estate in dower, and what by an estate by the courtesy?

SMITH'S COMMON LAW.

1. What is the law in regard to the liability of a tenant of premises which are destroyed by fire?

2. What are the respective rights of the creditors of a firm, and the creditors of one of the partners, as regards payment of their debts out of the effects of the firm, and of the partner respectively?

3. What is the legal relation and responsibility of a banker to his customer in regard to money deposited in the bank by the customer?

4. Explain the duty and responsibility of a person who employs a carrier to convey a dangerous article.

5. Explain the difference between a *penalty* and *liquidated damages.*

6. What will constitute *primâ facie* proof of the due receipt of a letter?

7. Explain the meaning of *easement*, and give an example.

EQUITY.

1. Define a trust. Into what different heads are they divided?

2. Explain the maxim: Equality is equity, and illustrate.

3. A mortgagor, at the time of the principal becoming due, pays the same to the mortgagee's solicitor, to whom he has been in the habit of paying the interest: the solicitor appropriates the money to his own use. On whom will the loss fall, and why?

4. Explain the doctrine of satisfaction. When does it usually occur?

5. State the rules as to the appropriation of payments between debtor and creditor.

6. A trustee, resident in Toronto, has occasion to forward a sum of money to a co-trustee living in Winnipeg: the latter appropriates the money. Is the Toronto trustee liable? Explain the general law.

7. Explain the general law as to the enforcement by specific performance of contracts for the sale of lands and chattels respectively.

CONTRACTS—STATUTES.

1. State the characteristics of *Obligation.*

2. What are the different modes whereby a contract is discharged? Distinguish them.

3. Distinguish *assignability* from *negotiability.*

4. A and B agree with C to buy a Patent Right if D approves of the Patent. A, B and C sign an agreement under seal, whereby A and B agree to sell and C agrees to buy the right, nothing being said in the document about D's approval. How far is evidence allowed on A and B's behalf to show that they are not liable, D not having approved? Why?

5. What is the effect of illegality on a contract?

6. In what cases does an agent require an authority under seal?

7. A promissory note is made on 2nd May, 1888, at three months. On the 2nd August, 1888, a renewal note is made, payable ten days after date. On what day is the renewal note due?

REAL PROPERTY.

Honours.

1. What agreements and other instruments relating to land are required to be in writing?

2. What leases must be under seal in order to be valid?

3. What is meant by a general occupant, and what by a special occupant?

4. What were the principal charges made in the law of descent by the Statute of Victoria?

5. What significance had the word "grant" in a conveyance, and how has it been affected by Statute?

6. Of what use are recitals in deeds more than twenty years old? Why?

7. What is meant by saying that a use cannot be limited on a use?

SMITH'S COMMON LAW.

Honours.

1. What is the difference between tenants *in fee*, *in tail*, and *for life*, in regard to the right to *commit waste?*

2. Under what circumstances is a private person justified in arresting another without a warrant?

3. What is the law as to the *privilege* of speeches in *Parliament* and at *public meetings*, and of *reports* of such speeches in public newspapers?

4. Define who are *legitimate* children.

5. Explain the difference between *factors* and *brokers?*

6. State the exceptions to the rule which excludes *hearsay evidence.*

7. Define *dormant partner* and *nominal*

partner; and explain the difference, if any, between them in regard to their liability on the contracts of the firm.

EQUITY.

Honours.

1. What is meant by the term "Marshalling of Assets?" What, if any, distinction is there with respect to the same in regard to private bequests, and those to a charity?

2. Define the equitable doctrine of election, and give an example.

3. A makes a mortgage to B for $1,000, with interest at five per cent. A proviso is inserted in the mortgage to the effect that if the interest be not punctually paid seven per cent. shall be charged. Explain the effect of such proviso.

4. Are there any cases in which mere inadequacy of consideration will constitute a ground for avoiding a contract? If so, what?

5. Define mistake, and distinguish between the relief granted in cases of mistake of law and mistake of fact respectively.

6. To what extent does the lien of a solicitor on the deeds, books and papers of his client extend?

7. A, knowing that there is a valuable coal mine on B's farm, enters into a binding contract with him for the purchase of the same at the ordinary agricultural value. B at the time is ignorant of the existence of the mine, but after the contract is signed discovers it, and seeks to have the contract set aside. Can he succeed? Explain.

CONTRACTS—STATUTES.

Honours.

1. A offers B by letter a certain number of sewing machines at a certain price. B by letter accepts the offer. Is A bound to deliver the sewing machines? If not, why not?

2. A sells B a piece of plate. The plate is marked with the Hall Mark, but A knows it is not sterling silver. B pays for the plate as if it were sterling silver. He afterwards finds he has an inferior article. Is A liable? Why?

3. A puts $1,000 to B's credit in order that B, on the strength of this fictitious credit, may get goods from C, the understanding being that as soon as the goods are got the $1,000 will be returned. Before B obtains the goods A demands back his $1,000. B refuses to return the money. Can A compel him to return it? Why?

4. "An executed contract cannot be discharged by a parol waiver." Why? What exception?

5. When a contract is broken and action is brought upon it, how can we arrive at the amount which the plaintiff, if successful, ought to recover?

6. If the direct object of the parties to a contract is unlawful, but their intention innocent, how far is the contract void?

7. A verbally orders from a cabinet-maker a cabinet to cost $40. At the time the agreement is made no such cabinet is in existence, but it is made according to instructions. Then A refuses to take it. What defence has A to an action by the cabinet-maker?

Miscellaneous.

SLIGHTLY PERSONAL.—It used to be the custom for judges when on circuit, in Scotland, to march in procession with the municipal authorities to the kirk on Sunday. Lord Cockburn, in his diary, relates that when Lord Moncrieff was at Glasgow, judicially, for the first time, he went to hear his friend, the pious and venerable Dr. Brown, preach. He was unwigged, but perfectly well known in the congregation. The minister was not dreaming of this judge, or of circuits, or any modern thing of the kind, but his text began: "There was in a city a judge, which feared not God, neither regarded man." He had only announced his text when the turning of all heads made him see the learned lord, and he could hardly proceed for confusion and horror.

NEW LAW BOOKS.—The Blackstone Publishing Company, as a result of their enterprise in publishing law books at low rates, have sold 240,000 volumes of their first and second series in two years. To those who do not wish to duplicate their libraries, they now offer the privilege of selecting twelve or more volumes from the first and second series at the yearly rates. The third series will commence on December 1st, 1888. A partial list of the books recommended by the general

editor for reprinting has been received. It contains many costly works. At least four volumes by American authors will be published in the coming series. All the books reprinted will be from the very latest editions.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending September 29th and October 6th contain Chaucer and the Italian Renaissance, *Nineteenth Century;* My Treasure, *Blackwood's Magazine;* A Winter in Syria, *Contemporary Review;* John Ward, Preacher, by Archdeacon Farrar, *Longman's Magazine;* Mr. Forster and Ireland, *Blackwood;* The Services of Catholic Missionaries in the East to Natural Science, *Nature;* Admiral Coligny, *Quarterly Review;* The Glorified Spinster, *Macmillan's Magazine* and *The Spectator;* Military Genius, by Lord Wolseley, *Fortnightly Review;* Recollections of Mr. Forster, *National Review;* An Artist on Tour, *St. James's Gazette;* The Central-Asian Railway, *Spectator;* Shakespeare and Modern "Isms," *St. James's Gazette;* Cornish Customs of To-day, *Welcome;* the conclusion of "Nat," and poetry and miscellany. A new volume began October 1st. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

LOOK TO THE DRAINS!

Worldly Solicitor (*soliloquizes*).—Confound old Capel Court! Why can't he let the matter stand till the "Long" is over? making me come up specially from Eastbourne. I had half a mind to tell him to go to ——

Quiller.—Mr. Capel Court, sir!

W. S.—Ah! my dear sir, and how are you? Better, I sincerely trust.

Mr. C. C.—Thanks, yes, and my wife and daughter are, I am thankful to say, better; and now, sir, I mean to make it hot—very hot, sir—for that rascal who let me that house——

W. S.—Stay, stay; you must remember that at present I am scarcely in possession of the facts.

Mr. C. C.—True, quite true. Yes, yes; no doubt you wondered at my conduct, dragging you up from Eastbourne, and coming down from Scotland myself. Well, you remember the house I took last season in Kensington——

W. S.—Certainly. Did I not have the pleasure of dining with you there once or twice?

Mr. C. C.—Why, of course you did. Well, sir, that house was a cesspool, a poison trap, a—a—well, the drains were in a disgraceful state—simply disgraceful state. My poor wife and daughter were attacked, as you know, by typhoid fever. I had to send them away to my place in Scotland, and I am pleased to say they are now recovering. I then had the place inspected by a sanitary engineer; and here is his report. Read it, sir, read it (*hands over paper*).

W. S.—Truly a bad condition of affairs—as bad as can be.

Mr. C. C.—And when I took the house—you know I am very fidgety about drains—I made the most particular inquiries, and the scoundrel——

W. S.—Landlord, my dear sir, landlord.

Mr. C. C.—No, sir, scoundrel! scoundrel! he distinctly told me that he recently spent £40 on the drains, and that he could confidently think his house was the best drained house in Kensington. Now look at that report: the drains are simply brick drains, they are defective, the soil is saturated with sewage. On my own responsibility I sent him a copy of this report, and said that I should at once take steps to expose his fraud. And—

W. S.—Pardon me. Did he reply?

Mr. C. C.—Oh yes, he answered my letter with the coolest possible impudence——

W. S.—Have you that letter?

Mr. C. C.—Yes—here it is (*hands it over*).

W. S.—Ah! says he lived there himself for two years—knew they were brick drains, spent the money in having them put in order, and had reasonable grounds for believing, and did honestly believe, they were in good order; expresses deep sympathy with you in your trouble, but declines to consider himself to blame. Hum! Ah! Well, did you answer this?

Mr. C. C.—Answer it? Why, of course I did. I—I said——

W. S.—Quite so, quite so! Did he answer?

Mr. C. C.—There is his reply. It adds insult to injury.

W. S. (*reads*). - Again expresses sorrow and sympathy — yes, yes, declines to consider himself liable—having sympathy with you in your trouble, does not desire that you should have more—eh? what? advises you to read the *Times* more regularly—refers you to a case, recent, quite recent, end of July—in which dispute almost similar, and the Appeal Judges held that the landlord was not liable—simply tells you this out of feelings of kindliness, and earnestly advises you to consult your lawyer.

Mr. C. C.—There! What do you say to that? Is it true that there has been such an infamous—such a disgraceful decision?

W. S.—Oh yes, quite true. He refers to a decision given by the Court of Appeal. *Rings.*) Quiller, the *Times Law Reports* for July—here—stay ah! here it is, p. 711, 25th July—*Butler* v. *Goundry*. Yes, the facts quite similar—the statement, Lord Justice Lindley said, was "in fact untrue, but was honestly made." That being so there could not be said to be fraud or misrepresentation.

Mr. C. C.—What, sir! do you mean to say that I may safely make a false statement if I simply think it to be true?

W. S.—Most certainly. You are not making a misrepresentation if you think you are telling the truth.

Mr. C. C.—And how the devil—pardon me—how is any one to know what I *think*?

W. S.—Question of evidence simply. Inward thoughts are indicated by outward acts. Your landlord, you see, *did* have the drains seen to: they worked well *then:* he lived there himself, and did not have fever; clearly he was justified in thinking his house well drained——

Mr. C. C.—Then—are you—are you going to advise me that I have no remedy against him at all—that——

W. S.—No, no, my dear sir, wait a moment. The gentleman, it is true, reads his *Times* diligently, and evidently relies on his legal knowledge; but we shall prove to him the truth of the old saying, that a man who is his own lawyer has a fool for his client. He will soon find this out when he is driven to seek his lawyer's assistance. Answer me one question. I am right in thinking that you took the house for the season *furnished?*

Mr. C. C. Certainly, certainly. Had I taken a lease I should have sought your advice. As I only took the house for six months, furnished, I allowed the house agent to carry the matter through.

W. S.—Then, my dear sir, we are all right. We will bring an action against him for damages for breach of an implied warranty that the house was reasonably fit for habitation.

Mr. C. C. But can we do that?

W. S.—Certainly. When a man lets a furnished house there is such a warranty, and that will, it has been decided by a well-known case, *Wilson* v. *Finch Hatton*, cover defects in drains.

Mr. C. C.—Ah! but then he will be able to say he didn't know of the defect.

W. S.—That in this case will be no defence.

Mr. C. C.—Well, well, no doubt you are right, only —

W. S.—One moment. When you sue for damages for misrepresentation you have to prove knowledge. When you sue for breach of warranty, whether the man knows or does not know is immaterial.

Mr. C. C.—Oh! really! Then supposing the house had been *unfurnished*, why could we not have sued for warranty?

W. S.—Because on the letting of an *unfurnished* house there is no warranty, so that you can only sue for misrepresentation. On the letting of a furnished house there is a warranty that it is reasonably fit for habitation.

Mr. C. C.—Then the whole question turns on whether the house is furnished or unfurnished?

W. S.—Quite so. That is *the* point.

Mr. C. C.—You're quite certain about all this?

W. S.—Perfectly certain, my dear sir, perfectly certain.

Mr. C. C.—And supposing a man's wife and daughter catch typhoid fever in a house, why should his right of action depend on the presence or absence of furniture? The drains give them the typhoid fever, not the furniture.

W. S.—Really, my dear Mr. Capel Court, you must put that conundrum to the Bench.

Mr. C. C.—Well there! Never mind, the law seems intensely stupid on this point. However, according to you I shall be able to mulct

this rascal in damages, so I won't quarrel with it—take the necessary steps. And now, when are you coming to Scotland? Next week, you promised.

W. S.—It will be next week. May I write fixing the day?

Mr. C. C.—Certainly; good-bye. You return to Eastbourne?

W. S.—Yes, till next week. Good-bye.

. . . . .

W. S. *(soliloquizes)*—That's very true; the drains give them fever, not the furniture—that Capel Court's no fool—yes, it's a curious rule of law.—*Law Notes.*

Appointments to Office.

ONTARIO.

MASTER OF TITLES.

District of Algoma.

Hon. Walter McCrea, of Sault Ste. Marie, local Master of Titles for the District of Algoma, *vice* H. C. Hamilton, resigned.

POLICE MAGISTRATE.

Grenville.

F. A. Tallman, of Merrickville, Police Magistrate in and for the village of Merrickville.

DIVISION COURT CLERKS.

Hastings.

H. Ashley, of Belleville, Clerk of the First Division Court of the County of Hastings, *vice* R. C. Hulme, removed from office.

Wellington.

L. R. Adams, of Drayton, Clerk of the Seventh Division Court of the County of Wellington, *vice* Geo. Allan, deceased.

DIVISION COURT BAILIFF.

District of Thunder Bay.

G. Donovan, of Port Arthur, Bailiff of the First and Third Division Courts of the District of Thunder Bay.

QUEBEC.

PUISNE JUDGE OF QUEEN'S BENCH.

Joseph G. Bossé, of the City of Quebec, Puisne Judge of the Court of Queen's Bench in the Province of Quebec, *vice* Hon. Samuel C. Monk resigned.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography- North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888 / 1890 Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

VOL. XXIV. NOVEMBER 1, 1888. NO. 17.

WE regret to chronicle the death of Hon. James Patton, Q.C., who was one of the founders of this journal more than thirty years ago. His death was as sudden as it was deplored. We shall refer to his career hereafter.

WE make space to note the following changes in the judiciary, which have just been announced: Hon. Mr. Justice Patterson takes the place of the late Mr. Justice Henry in the Supreme Court, at Ottawa; and James Maclennan, Q.C., is to fill the seat vacated in the Court of Appeal.

A SOMEWHAT important change has been made by the revisers of the statutes in regard to jury notices. Under the Revised Statutes of 1877, c. 50, s. 253, the jury notice was required to be delivered with the last pleading; but now, by the Revised Statutes of 1888, c. 44, s. 78, the notice may be delivered at least eight days before the sittings at which the action is to be tried, or within such other time as may be ordered by the court or a judge. The jury notice, therefore, need not now be served until after notice of trial has been given. This change, we fear, has been made, like some others, without sufficient consideration of the consequences, and of the fact that it places in the hands of a litigant desirous of delay a means of effecting his wishes through the forms of legal procedure, which he is very likely to abuse. It certainly seems in the highest degree inconvenient that after notice of trial before a judge alone has been given, and preparation made for the trial, it should be open to the opposite party merely by filing a jury notice to render the notice of trial nugatory, and postpone the trial perhaps for three or four months. When a jury notice is given under such circumstances, it is obvious that the costs of the notice of trial, and of issuing, and serving, and countermanding subpœnas may, in many cases, be rendered useless, and questions will arise as to which of the litigants is ultimately to bear these useless costs. If the opposite party is within his rights in giving the jury notice, it is difficult to see how he can be made liable for the costs of the abortive proceedings, even though he should ultimately fail in the action; and at the same time it is hard that the opposite party, if successful, should be put to these useless costs. We doubt very much whether the amendment made by the revisers is likely to turn out any improvement on the former procedure.

BAILABLE PROCEEDINGS AGAINST A DEFENDANT BEFORE JUDGMENT.

WHEN recently commenting on the Consolidated Rules, we took occasion to, remark, that those relating to bailable proceedings appeared to be sadly defective and that this branch of practice was particularly in need of simplification and codification. It may be useful now to point out in a little more detail, how this should be done; but, before doing so, it may be well briefly to glance at the present condition of the law on this subject in Ontario.

In Ontario, the right to arrest a defendant before judgment depends upon three things: (1) The defendant must be a person liable to arrest; (2) The plaintiff, or his agent, must be able to swear that the plaintiff has a cause of action against the defendant to the amount of $100 or upwards; and (3) Such facts and circumstances must be shown by affidavit as satisfy a judge that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular.

The new Rules have varied the procedure to be observed in procuring the arrest of a defendant from that laid down by the statute, R. S. O. c. 67, s. 1. The statute provides that the judge shall make an order to hold the defendant to bail for such sum as he thinks fit, and, therefore, the plaintiff is to sue out a writ of *capias*. The writ of *capias ad respondendum* is abolished by the Consolidated Rule 1045, and the defendant is now to be arrested simply upon the judge's order.

In England a defendant is liable also to arrest before judgment, but then it depends on four things: (1) He must be a person liable to arrest; (2) The plaintiff must show a good cause of action against him for £50 or more; (3) It must be shown that the defendant is likely to quit England, unless he be apprehended; and (4) That the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.

This fourth condition, it will be observed, does not prevail in this Province. In England, as in Ontario, the arrest is made on the judge's order, and the issue of a writ of *capias* is dispensed with.

After the arrest has been made, the procedure in England and Ontario materially differs. In Ontario the old procedure is continued; the defendant first goes through the form of giving bail to the sheriff, or "bail below," as it is called. This bail is given by bond to the sheriff by two sureties, and for double the amount for which the defendant is ordered to be held to bail. The condition of this bond is, that the defendant will, within ten days, put in special bail, or "bail to the action," or "bail above," as it is called. This bond must be taken by the sheriff before the time for putting in special bail has expired, or it will be void.

The defendant having given a bond to the sheriff that he will in due course put in special bail, has then, within the time limited for that purpose, to put it

in. Now, the putting in and perfecting of this "special bail," is a somewhat complicated proceeding. According to the Rules, it is to be put in and perfected according to the established practice (Rule 1067).

It is a very easy matter to provide that special bail is to be put in according to the "established practice"; but, judging from past experience, we should say it is a very difficult thing, indeed, to say what is the established practice. The student cannot be referred to any statute or code of rules which will enlighten him; he cannot be even referred to any Canadian cases, which will enable him to learn intelligently what the established practice on this subject is.

In order to make this out, he must go to some of the older works on the English practice at law, and he must, in reading them, carefully note wherein express statutes and rules of court, either in England or Ontario, create a difference in the practice there laid down; and having carefully weighed and considered all these questions, he may, perhaps, have arrived at a faint glimmering of what is the established practice; but he will be a bold man, indeed, if he have any very great confidence in the knowledge thus acquired. His greatest security lies in the fact that his opponent, probably, knows as little about the "established practice" on this point, as he does himself. That there should be this difficulty is not, after all, very surprising, when we consider that the arrest of a defendant on *mesne* process has become a comparatively rare proceeding; not much opportunity, therefore, arises in the ordinary course of practice for getting any very accurate knowledge on the subject; and what is learned, is learnt for the occasion as it arises, and only so far as the exigencies of the occasion make it necessary. We do not pretend to greater wisdom than our fellows, and in venturing to state what we think is this established practice to which Rule 1067 refers, we feel that we are on treacherous ground.

Special bail may be given either by bond or recognizance, conditioned that if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the county in which the action is brought, or that the sureties will do so for him (Rule 1062). The sureties are not to exceed two in number, except by leave of the court or a judge (Rule 1070), and they cannot justify if they have been indemnified for so doing by the solicitor or solicitors of the defendant (Rule 1072). The recognizance of bail cannot be taken by any one employed as solicitor or agent for either party (Rule 1073). And if any person put in as bail, except for "the purpose of rendering only," be a practising solicitor, or a clerk to a practising solicitor, or sheriff's officer, bailiff, or person concerned in the execution of the process, the plaintiff may treat the bail as a nullity, and sue upon the bail bond given to the sheriff as abovementioned as soon as the time for putting in special bail has expired, unless good bail be duly put in in the meantime (Rule 1074). The recognizance of bail may be acknowledged before a judge, or the Master in Chambers, or the Judge of the County Court, or Local Master having jurisdiction in the action, or before a commissioner for taking affidavits, and recognizances of bail.

The recognizance of bail being duly acknowledged, or the bond duly

executed, the next thing to be done is to get it allowed; and the procedure for doing this is left by the Rules in the greatest obscurity. Formerly, in every case, the bail had to be allowed by a judge in Chambers, at Toronto, and Rules which were appropriate enough when this was the practice have been retained, in apparent forgetfulness of the fact that the extension to the County Court Judges and Local Masters of jurisdiction in Chambers has materially altered the practice in this respect.

According to the English practice, the bail-piece was not filed until it had been allowed by the judge as sufficient. The bail-piece appears to have been deposited in the Judge's Chambers, and entered in the judge's book kept for the purpose, and notice given to the plaintiff of justification; and the bail attended in person at the time named, and were examined orally as to their sufficiency. The personal attendance of bail, however, is no longer necessary unless expressly ordered, but they may now justify by affidavit (Rule 1063). Under our Rules it is not clear whether the bail-piece, with affidavits of due taking thereof, and of justification, are intended to be filed with the officer in whose office the proceedings are to be carried on before allowance, or not (see Rule 1075); in that Rule it is provided that when bail is put in in the county, and is to be justified in court, the deputy clerk, with whom the bail-piece is *filed*, is to transmit it, with the affidavits of due taking and justification, to the proper officer in Toronto. But is not the Local Master, or County Court Judge, as the case may be, "the court" for the justification of bail in such cases? Rule 1077, on the other hand, seems inconsistent with the filing of the bail-piece before the allowance of the bail, for it provides that if the plaintiff does not give one day's notice of exception, "the bail may be taken out of court without other justification than the affidavit," which is inconsistent with the bail being already filed, though consistent with it having been merely deposited for the purpose of justification. Assuming that the bail-piece and affidavits are to be filed before the bail is justified and allowed, notice in writing, at all events, must be given to the plaintiff of the filing, or putting in of the bail. And here comes another little difficulty: Rule 1075 contemplates that the affidavits of justification shall be filed with the bail-piece; but Rule 1076 contemplates, apparently, that the affidavits may be served with the notice of bail. How they can be served on the plaintiff and at the same time filed we do not know, unless they are sworn in duplicate, one of which is filed and the other served. At any rate, the notice of bail may, or may not, be accompanied by an affidavit of justification of each of the bail according to the form No. 46, in the appendix to the Rules. If the affidavits are delivered with the notice, and the plaintiff afterwards takes objection to the sufficiency of the bail, or "excepts to the bail," as it is technically called, and such bail are allowed, the plaintiff must pay the costs of justification (Rule 1076), which is hard on the plaintiff, to say the least, especially as after service of notice of the bail it seems that he may have only one day to give notice of exception, otherwise the bail may, as we have said already, "be taken out of court without other justification than the affidavit" (Rule 1077), which is another way of saying that the bail is to be allowed as sufficient. This we

take to be the meaning of Rule 1077, though it must be confessed if that is its meaning it is not very clearly expressed.

If the defendant, with his notice of bail, does not serve affidavits of justification of the bail on the plaintiff, the latter has twenty days after the receipt of the notice within which "to except" to the bail (Rule 1078). Where notice of "exception" is given, the bail may justify by affidavit or affirmation, but need not attend personally to be examined as to their sufficiency, unless so ordered by the court or judge (Rule 1063). The affidavits of justification must show that the bail are worth "double the amount sworn to" (*i.e.*, the amount the defendant is to be held to bail for; *Baker* v. *Jackson*, 9 O. R. 661, which, by the way, is not always the same as the amount sworn to), over and above what will pay all their just debts, and over and above every other sum for which they are bail, but when the amount "sworn to" exceeds $4,000, it is sufficient if the bail justify in $4,000 beyond the "sum sworn to." (Rule 1079.) According to the old English practice, from which our "established practice" is derived, the names of the bail are required to be entered in "the judges' book," as we have already said, and the plaintiff is to enter in this book his exception, "I except against these bail," and serve a notice thereof on the defendant's solicitor; but as we believe it has never been the custom of the judges to keep any book for entering the names of bail, this mode of excepting to bail cannot be considered a part of our "established practice." The notice of exception must be in writing, and delivered within the twenty days; possibly also it should be filed as a substitute for the entry in the judges' book, but concerning this the established practice is obscure. If the notice be verbal, or not delivered within the twenty days, the objection may be waived by the defendant afterwards giving notice of justification; but his waiver will not affect the sheriff, as against whom no proceedings can be taken if the exception to the bail be not duly given within the prescribed time (Sellon Pr., Vol. I, p. 152). Within four days after notice of exception, the bail are to justify before a Judge in Chambers (Rule 1081), or, it is presumed, the judicial officer authorized to exercise jurisdiction in Chambers. The affidavit of justification by the bail is apparently *prima facie* sufficient; and if the plaintiff disputes the sufficiency of the bail, it would be necessary for him to cross-examine the bail on their affidavits of justification, and produce such affidavits in opposition as he may think necessary (Rule 1063). The question of the sufficiency of the bail being determined if the bail is allowed, an order must be taken out allowing the bail; the bail-piece, with the order of allowance, is then to be filed in the office where the pleadings are required to be filed, and the bail is then put in and perfected.

But if, as sometimes happens, "special bail," or "bail to the action," or "bail above," as it is called, is not put in and perfected within the time limited, it will be necessary for the plaintiff to obtain a return from the sheriff of *cepi corpus* to the order of arrest, and upon this return he is entitled to issue an order, of course, to the sheriff "to bring in the body,"—not that he wants the body of his debtor in the least, but this is merely the technical mode for compelling the putting in of special bail. It would seem only reasonable that if the defendant

does not put in special bail within the time required by the order for his arrest, that his bail to the sheriff, or "bail below," should be at liberty to render their principal into the sheriff's custody again. But there are technical difficulties in the way of such a simple proceeding, and it is the "established practice" that before they can do this they must go through the solemn farce of putting in "special bail," even though immediately it is put in, and before it is justified, it is the intention of the bail to surrender their principal. This is called "bail for the purpose of rendering only," referred to in Rule 1074.

Then if the "special bail" be not put in, pursuant to the rule "to bring in the body," the plaintiff is entitled to call upon the sheriff to assign the bail bond, which he has taken, and forthwith to commence an action thereon in his own name against the sureties. This action, however, the sureties are entitled to have stayed on the terms of putting the plaintiff in the same position as if no default had been made, *e.g.*, by putting in and perfecting special bail, and paying the costs of the action; but no such order is to be made, staying the action, except where the application is made by the original defendant, upon an affidavit of merits; or where it is made by the sheriff, bail, or any officer of the sheriff, upon an affidavit showing that the application is really and truly made on the part of the sheriff or bail, or sheriff's officer, as the case may be, at his own expense, and for his own indemnity, and without collusion with the original defendant (Rule 1060). Or, instead of taking an assignment of the bail bond from the sheriff, the plaintiff, in the event of special bail not being duly put in and perfected, may, on the return of the order "to bring in the body," issue an attachment against the sheriff, which, however, may be set aside on the like terms as an action on the bail bond may be stayed.

Then, assuming the special bail is duly put in and perfected, the defendant is entitled to a writ of *supersedeas*, if he is in custody, which commands the sheriff to release him, if detained for no other cause.

The action must be duly proceeded with, and if the defendant, instead of giving bail, remains in the custody of the sheriff, the plaintiff must deliver his statement of claim within one calendar month after the arrest, otherwise the defendant will be entitled to be discharged, unless further time to deliver a statement of claim is given to the plaintiff by the court or a judge (Rule 1052). Judgment having been obtained, the plaintiff must then "charge the defendant in execution," in order to "fix the bail"; this is done by issuing a *ca. sa.*, and delivering it to the sheriff within fourteen days after the plaintiff is entitled to enter judgment (Rule 1053); whereupon the bail must either pay the plaintiff's claim to the extent of the amount for which they are bail (Rule 1085), or must surrender their principal to the close custody of the sheriff. In default of their so doing, the plaintiff must get a return of *non est inventus* to the *ca. sa.*, and he may then commence an action against the bail. But in order to "fix the bail," the plaintiff must take care that his *ca. sa.* is returnable on a day certain, and not immediately after execution: *Proctor* v. *McKenzie*, 11 O. R. 486.

Rules 1045-1088, which are supposed to embody the practice on this subject, are taken from the Common Law Procedure Act and the Common Law Rules passed pursuant thereto. The wording of these Rules is in several instances

ambiguous and obscure, and technical terms are used which are quite unnecessary, and, instead of elucidating, tend rather to obscure their meaning. It is to be greatly regretted that the revisers of the Rules did not see fit to consult the English Rules on this point, as they are a model of simplicity and perspicuity. They are only seven in number (Rules 1030-1036)—instead of forty-four—and provide for form of order for arrest, and for applying to discharge the order,—the indorsements to be made on the order before its delivery to the sheriff,—and on the arrest being made for the issue of concurrent orders, and the fees payable to sheriff. That security may be given by deposit of the sum mentioned in the order in court, to abide the order of the court, or by giving a bond to the plaintiff executed by the defendant and two sureties. The plaintiff, within four days after service of notice of the names and addresses of the sureties, may object to them, giving the particulars of his objection, which may then be adjudicated upon by the Master, who has power to award costs. The plaintiff is, within four days after giving his notice of objection, to obtain an appointment from the Master for the purpose of disposing of the objection, and in default, the security is to be deemed sufficient. The costs of the arrest, unless otherwise ordered, are to be costs in the cause. If money is deposited, a receipt is to be given, and if a bond is given, a certificate is to be given by the plaintiff or his solicitor, upon production of which receipt or certificate to the sheriff the defendant is to be released.

It may be that the adoption of the English Rules on this subject *verbatim* would not answer, because they appear to require the defendant arrested to give security for the payment of the claim if the plaintiff succeed in the action, whereas our statutes only require the defendant to give special bail conditioned to pay the condemnation money or render himself to the sheriff; and even when the plaintiff has recovered judgment and arrested the defendant under a *ca. sa.*, the latter is entitled to be released on giving a bond to abide by and observe the orders of the court. So that the arrest of a defendant in Ontario is by no means any security that the debt for which he is arrested will ultimately be paid. But some suitable modification of the English Rules would certainly have been far better than keeping alive the senseless rigmarole of "bail below" and "bail above," with all the other incidental technicalities. When the defendant is arrested he should be required to give security in the first place to the plaintiff and not to the sheriff; this might be done, either by depositing the sum in respect of which he is arrested in court, subject to the further order of the court, or by giving a bond with two sureties for the amount for which the arrest is made, conditioned that the defendant will abide by and observe the orders of the court, etc., as provided by R. S. O. c. 67, s. 14, for that is all the plaintiff can ultimately get, and he might as well be allowed to get it at first as being put to the useless expense of issuing orders on the sheriff to return the order of arrest, and "to bring in the body," and winding up with the writ of *ca. sa.* R. S. O. c. 67, s. 14, does in fact authorize a bond of this kind to be given by a defendant arrested on *mesne* process, but its beneficial effect appears to have been rendered nugatory by the Rules which require "special bail" to be given, which bail are to be subject to an entirely different condition (see Rule 1062).

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for October comprise 21 Q. B. D. pp. 349-413; and 39 Chy. D. pp. 1-83.

PRISON—GOVERNOR OF PRISON—WARRANT OF COMMITMENT—FALSE IMPRISONMENT.

Henderson v. *Preston*, 21 Q. B. D. 362, is an action in which the plaintiff sues the governor of a prison for false imprisonment under the following circumstances: The plaintiff was, on the 24th August, summarily convicted of an offence and sentenced to pay a fine, or in default to be imprisoned for seven days. He was arrested the same day, but was not lodged in prison until 25th August. The defendant kept the plaintiff in custody during 31st August. The plaintiff contended that the term of imprisonment began on 24th August and expired on 30th August. But the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.), without determining whether the imprisonment began on the 24th or 25th August, held that the defendant had acted within the terms of the warrant, and was therefore protected and not liable to the action.

NEGLIGENCE—MASTER AND SERVANT—PERSON INTRUSTED WITH SUPERINTENDENCE—EMPLOYERS' LIABILITY ACT, 1880—(R. S. O. c. 141, s. 2, s.s. 1; s. 3, s.s. 2).

In *Kellord* v. *Rooke*, 21 Q. B. D. 367, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of the Divisional Court (19 Q. B. D. 585), noted *ante* p. 10. The point in the case was whether a workman who was the foreman of a gang, and as such took part in the manual labour performed by the gang, could be said to be a "person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour" (see R. S. O. c. 141, s. 2, s.s. 1), and the court was clear that he did not come within that definition.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880—(R. S. O. c. 141, s. 3, s.s. 1)—DEFECT IN MACHINERY—DANGEROUS MACHINE.

Walsh v. *Whiteley*, 21 Q. B. D. 371, is another case under the Employers' Liability Act, which, by the way, bids fair to be as fruitful a source of litigation as the Statute of Frauds. In this case, the Court of Appeal lays down the rule that the mere fact that a machine is dangerous to a workman employed to work with it, does not show that there is a defect in the condition of the machine within the meaning of the Act (R. S. O. c. 141, s. 3, s.s. 1). Because the Act expressly provides (see R. S. O. c. 141, s. 5, s.s. 1) that unless the defect arose from, or had not been discovered or remedied, owing to the negligence of the employer or some person in the service of the employer, and intrusted by him with the duty of seeing that the machinery was in proper condition, the workman is not to be entitled under the Act to any right of compensation against the employer, and these two sections must, therefore, be read together. In this case the plaintiff was employed by the defendants to work a carding machine. Part of the machine consisted of a wheel and pulley, upon which, while in motion,

the plaintiff had to place a band. The disc of the wheel had holes in it, and while the plaintiff was putting on the band his thumb slipped through one of these holes, the result being that he lost his thumb. It was proved that though these wheels were sometimes made without holes, they were commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously been made with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine, which he had used for thirteen years, because it had never entered his head that it was dangerous. On these facts the Divisional Court (Wills and Grantham, JJ.) had differed. Wills, J., holding that there was evidence to go to the jury that the machine was defective, and Grantham, J., being of the contrary opinion. The Court of Appeal also presented the somewhat unusual spectacle of differing in opinion. This difference of opinion is accounted for by Lord Esher, M.R., who dissented from Lindley and Lopes, L.JJ., by the fact of there being, as he thinks, two schools of thought in relation to cases of this kind, the one striving to prevent injustice to masters by construing Acts of this kind as strictly as possible; while the other school regards masters and servants as not on an equal footing, the danger of the employment always falling on the workman, who was, therefore, to be protected by a liberal construction of Acts intended for his benefit. He confesses that he has always been of the latter school, and, therefore, in the present case agreed with Wills, J. He goes so far as to say that although the machine be of the best construction invented, yet if a master permit the machine to be used by his workmen, knowing it to be dangerous, the master is liable. He considers, too, that the defect contemplated by the Act, is not a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workman using it. Lindley and Lopes, L.JJ., however, take the opposite view, and lay it down that the defect contemplated by the Act, as one making the employer liable, is one due to the negligence of the employer, and that the negligence of the employer is a necessary element in order to make the employer liable; and the defect in the machine must be one having regard to the use to which it is to be applied, or the mode in which it is to be used. The defect may be one in the original construction of the machine, or arising from its not being kept up to the mark, which renders it unfit for the purposes to which it is applied, when used with reasonable care; or a defect arising, or existing, from the negligence of the employer. They say the Act is not directed against dangerous machines, but against the negligence of employers. And this is the view which must now be considered the proper exposition of the statute.

BENEFIT SOCIETY—INSURANCE—PAYMENT OF DEATH ALLOWANCE ACCORDING TO AGREEMENT WITH DECEASED—RIGHT OF ADMINISTRATOR.

Ashby v. *Costin*, 21 Q. B. D. 401, was an action by the personal representative to recover a sum of money claimed to be due from a friendly society of which the deceased was a member. The deceased had, upon making applica-

tion for membership, signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives, in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered the committee to pay the allowance to such person or persons as, in their discretion, they might think fit; and further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it was bequeathed. In the event of the deceased dying intestate and without any relatives within the specified degrees, the fund, after payment of the deceased's funeral expenses, was to belong to the society. Upon the death of the deceased intestate, the committee paid the allowance to the deceased's sister, the person specified in the rules. The plaintiff claimed the fund as administrator, but it was held by Cave and Grantham, JJ., that the rule constituted the contract between the deceased and the society as to the payment of the money, and that the death allowance was not the property of the deceased in his lifetime, nor, in the absence of his making a will regarding it, was it assets for the payment of his debts, and that, therefore, the plaintiff could not recover. Cave, J., who delivered the judgment of the court, says, "The death allowance is not the property of the member in the sense of its belonging to him absolutely in his lifetime, he has no right to it but such as the rules give him. If he chooses to bequeath it by his will, it will, as we have already said, be assets, but if he does not choose to exercise this power, the committee, and not the member, will determine which of his relatives will get the allowance, and in what proportions; and, unless he leaves surviving relatives within certain degrees, the balance, after payment of his funeral expenses, will remain the property of the society.

ARBITRATION—INCORPORATION IN SUBMISSION OF C. L. P. ACT, 1854—POWER TO REVOKE SUBMISSION—(R. S. O. c. 53, ss. 13-16.)

In re Mitchell v. *Governor of Ceylon*, 21 Q. B. D. 408, a question arose as to whether one of the parties to a submission to arbitration was in a position to revoke the submission under the following circumstances: By a contract, in writing, it was agreed that disputes between the contracting parties should be referred to arbitration. The contract did not contain an express stipulation that the submission should be made a rule of court, but by one of its clauses it was agreed that the provisions of the C. L. P. Act, with regard to arbitration, so far as applicable, should apply to the arbitration therein agreed to. A dispute arising out of the contract having been referred, one of the parties revoked the submission. The arbitrator proceeded *ex parte*, and made his award. On a motion to set aside the award, on the ground that the submission had been revoked before the making of the award, Cave and A. L. Smith, JJ., held that the submission by incorporating the provisions of the C. L. P. Act was equivalent to an agreement that the submission should be made a rule of court, and that, therefore, under the provisions of 3 & 4 Wm. IV. c. 42, s. 39, the sub-

mission was not revocable without the leave of the court. Under R. S. O. c. 53, s. 13, every submission to arbitration may be made a rule of court, unless the agreement contains words purporting that the parties intended that it should not be made a rule or order of court; and by s. 16, no submission not containing words purporting that the parties intend that it shall not be made a rule of court is revocable without the leave of the court. The effect of s. 13 (Eng. C. L. P. Act, s. 17), however, Cave, J., points out, was discussed in *Mills* v. *Bayley*, 2 H. & C. 36, where it was held that this section has not the effect of inserting in the agreement a clause empowering it to be made a rule of court, or, in other words, that this statutory power was not the same thing in effect as an agreement that the submission should be made a rule of court. This decision was followed in *In re Rouse and Meier*, L. R. 6 C. P. 212, and by the Court of Appeal in *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310. But the learned judge distinguishes those cases from the present, because here the parties had expressly incorporated the provisions of the C. L. P. Act; and, therefore, section 17 was included in the submission; and, therefore, in this case, there was an express agreement that the submission should be made a rule of court; and, therefore, under 3 & 4 Wm. IV. c. 42, s. 39, the submission was not revocable, and in this conclusion the Court of Appeal (Lindley and Bowen, L.JJ.) concurred. We may observe, however, that 3 & 4 Wm. IV. c. 42, s. 39, is not as wide in its terms as R. S. O. c. 53, s. 16, and under the latter section it would seem clear that, even without the incorporation of the provisions of the C. L. P. Act, no submission which does not contain words purporting that the parties intend that it should not be made a rule of court can be revoked without the leave of the court, as provided in that section.

COMPANY—ARTICLES OF ASSOCIATION—POWER TO ISSUE PREFERENCE SHARES—WINDING-UP—SURPLUS ASSETS—NET PROFITS.

Turning now to the cases in the Chancery Division, we find *In re Bridgewater Navigation Co.*, 39 Chy. D. 1, calls for notice. In this case two points arose: first, as to the right of the company to issue preference shares; and, second, the rights of preference and ordinary shareholders in the surplus assets of the company. The original memorandum of association provided that the capital of the company should consist of 500 £1,000 shares. Article 4 gave power to create additional share capital, which might be issued as preference shares. By special resolution, under a power in the articles, it was resolved that the 500 £1,000 shares should be converted into 50,000 £10 shares, and that the capital should be increased by 80,000 new £10 shares. The company, by special resolution, repealed the original articles and substituted others, one of which was to the same effect as the original article 4. When 100,000 £10 ordinary shares had been issued, the company resolved to issue the remaining 30,000 £10 shares as preference shares. North, J., held that the 30,000 preference shares had been validly issued. That though the original 50,000 shares could not be issued with preferential rights, the 80,000 new shares were in a different position, and under article 4 were entitled to be issued with pre-

ferential rights. With regard to the contest as to the distribution of the surplus assets realized on winding up the company, the articles of association provided that the entire net profits of each year, subject to providing a reserve, should belong to the holders of shares. The preference shares were subsequently issued entitling the holders to a fixed dividend. Under a statute the company sold its undertakings to another company for a specified price, which left a large surplus after payment of liabilities and return of paid-up capital. This surplus, the ordinary shareholders claimed, must be regarded as net profit, and as such was divisible among them to the exclusion of the preference shareholders, but North, J., held that the surplus was divisible among ordinary and preference shareholders in proportion to the amounts paid up on their shares. The decision of North, J., was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.).

TRADE MARK—FANCY WORD.

In *Waterman* v. *Ayres*, 39 Chy. D. 29, the plaintiff had registered the word "*Reversi*" as a trade mark for a game somewhat similar to draughts. The word was the name of a game of cards popular in France in the sixteenth century. In the rules of the plaintiff's game the word "reverse" frequently occurred, and the game depended on the players reversing each other's counters. The defendant brought out a similar game under the name of "Annex," and on the labels of the boxes in which he sold it were the words "a game of reverses." This action was brought to restrain the infringement of the plaintiff's trade mark, and the defendant applied to remove the trade mark from the register. Kay, J., refused the application of the defendant, and granted the plaintiff an injunction to restrain the defendant from using the word "reverses" or any colourable imitation of the word "*Reversi*." But on appeal his decision on both points was reversed. The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) holding that as the word "*Reversi*" would suggest to an ordinary Englishman that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article, and was, therefore, not a "fancy word" which could properly be registered as a trade mark. And further, that as defendant's use of the words "a game of reverses" was a fair description of the nature of the game, and not indicative of any design on the part of the defendant to pass off his goods as those of the plaintiff, an injunction ought not to have been granted.

MORTGAGE — VALUATION — ACTION FOR FALSE VALUATION — NEGLIGENCE — MISREPRESENTATION.

Cann v. *Willson*, 39 Chy. D. 39, was an action brought by a mortgagee against valuers of the mortgaged property, who had made their valuation at the request of the mortgagor, and sent it direct to the plaintiff, knowing that the valuation was required for the purpose of enabling the mortgagor to obtain an advance, and on the faith of which the mortgagee had advanced his money. The defence was based on the ground that there was no privity between the

plaintiff and defendant; that as between them the valuation was given gratuitously, and, therefore, the defendant was not liable. But Chitty, J., held that the defendant was liable on two grounds: (1) That (independently of contract) the defendant owed a duty to the plaintiff, which he had failed to discharge; and (2) That he had made a fraudulent misrepresentation, on the faith of which the plaintiff had acted.

WILL—CONSTRUCTION—TENANT FOR LIFE, AND REMAINDERMAN—UNAUTHORIZED SECURITIES—TRUSTEES, POWER OF, TO RETAIN EXISTING SECURITIES.

In re Sheldon, Nixon v. *Sheldon*, 39 Chy. D. 50, a testator had empowered his trustees in their discretion to retain all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or else to convert the same and invest the proceeds in certain specified securities. At his death part of his personal estate consisted of securities not of a wasting nature, and not specifically authorized. An administration action having been brought, it was found by the Chief Clerk that some of the securities were proper to be continued, and that others should be called in. A question thereupon arose, whether the tenants for life of the unauthorized securities were entitled to the full income thereof, or whether such securities should be converted and the tenants for life be entitled only to interest on the proceeds of conversion as from a year after the testator's death, which is the rule when the unauthorized securities are of a wasting nature. But North, J., was of opinion that as the securities which the Chief Clerk reported should be continued were not of a wasting nature, they might be ordered to be retained, and that the tenants for life were entitled to the whole income produced from them.

COPYRIGHT—DRAMATIZATION OF NOVEL—INFRINGEMENT—INJUNCTION—5 & 6 VICT. C. 45, SS. 2, 3.

Warne v. *Seebohm*, 39 Chy. D. 73, was an action to restrain the infringement of a copyright of a novel. The defendant had dramatized the novel, "Little Lord Fauntleroy," and caused his play to be performed on the stage. The infringement complained of was, that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, which were in MS., or made with a type-writer. Very considerable passages in the play were taken almost *verbatim* from the novel. The defendant claimed the right to make more copies, if it should be necessary, to enable him to give further representations of the play in London and elsewhere. Stirling, J., held that what had been done by the defendant constituted an infringement of the plaintiff's copyright, and he granted an injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages from the plaintiff's novel, and also for the cancellation of all passages taken from the plaintiff's book, which were contained in the four copies of the play. As to the rights of third persons to dramatize a copyright novel, Stirling, J., thus lays down the law at p. 81: "So long as he does

not print or otherwise multiply copies of the novel, any person may dramatize, and may cause his drama to be publicly represented. But if, for the purpose of dramatization, he prints, or otherwise multiplies copies of the book, he violates the rights of the author no less than if the copies were made for gratuitous distribution."

Notes on Exchanges and Legal Scrap Book.

RESTRAINT OF TRADE.—A somewhat interesting case in relation to restraint of trade was decided by the New York Supreme Court in *Thomas* v. *Musical Protective Union*, 49 Hun. 171. The defendant corporation was organized for the cultivation of music and the furtherance of the interests of the musicial profession, as well as for the pecuniary relief of its members. It enacted by-laws providing that no member should perform in any orchestra or band in which any performer was employed who was not a member of the union, and no person was eligible for membership unless he had been a resident of the United States for at least six months. The court below gave judgment restraining the union from enforcing its by-laws against the plaintiff to recover penalties for employing non-union musicians in his orchestra. The defendant company was incorporated for the cultivation of music, friendly intercourse and the relief of its members, and the plaintiff had been a member since 1876, but had been absent from New York several years, during which absence the by-law regarding six months' residence was passed. He employed a foreigner to perform in his orchestra, whereupon the union imposed fines upon him. The Supreme Court affirmed the judgment of the court below, and held that the by-laws were illegal and void, being in restraint of trade.

NEGLIGENCE.—In *Fitzpatrick* v. *Garrisons and West Point Ferry Co.*, 49 Hun. 288, it was held that where a ferry company carries on a business which naturally draws together numbers of people in a place which is open to the public, with instruments which are so defective as to be eminently dangerous to human life, it is guilty of a breach of duty to the public for injuries resulting therefrom, although the party injured may not have come upon the place on any business connected with the ferry company. The plaintiffs and other boys had gathered on the dock where the ferry-boat landed. and got upon a bridge and by their weight brought it down on the boat with some force, the result of which was that a bolt, which had fastened to it a chain running over a pulley with a weight at the other end, pulled out of one corner of the bridge, and the weight on that side fell, striking the plaintiff. The place at which the accident happened was Cranston's dock, at Highland Falls, which was private property, which did

not belong to the defendant, nor did the defendant have any lease of it, although it had been used by the defendant for some time for the landing of its boat. The court said: "The accident under consideration occurred at a place which was open to the general public, which they had been long accustomed to use, and into which they were impliedly invited to enter. They had, therefore, a right to assume that no traps existed that would make such entry dangerous. The appellant claims that as the plaintiff came upon the premises solely to gratify his curiosity, and was at most but a licensee, the defendant owed him no duty of active vigilance. But defendants must be held to have contemplated the natural consequence of their acts. They carried on an occupation which would naturally draw together numbers of people in a public place, with instruments that were so defective as to be eminently dangerous to human life. That was a breach of duty to the public for which they may be justly held responsible. The plaintiff might well suppose that defendant's business was conducted with ordinary care; there being no warning of danger, he may well have thought that none existed. In thus supposing, and in acting accordingly, the jury have found that he was not guilty of negligence. We think the question was properly submitted and by them properly decided. We also think this case is within the reason of the rule that holds the owner of the real estate liable when he allows a dangerous place to exist without warning, so near a highway that by-passers will be liable to suffer. If the owner of real estate will dig a pit nigh to the public road he must fence it or be liable for the injuries it occasions. Such owner is bound to anticipate that a traveller may deviate from the beaten path. And a technical trespasser does not thereby forfeit the protection of the law. As in the case of the druggist who sends abroad a dangerous medicine under a false label, no 'privity of contract' is necessary. The duty which one owes to the public to forbear from conduct which may endanger the safety of others is the foundation of the action."—*Albany Law Journal.*

ATTORNEY ACTING FOR EACH PARTY IN TURN.—In *Weidekind* v. *Tuolumne County Water Co.*, California Supreme Court, December 23, 1887, it was held error to allow an attorney and counsellor-at-law, who had formerly acted for the plaintiff in the trial of a cause, to appear and act on behalf of the defendant at a subsequent trial of the same cause; his avowed intention being to assist the defendant with all the knowledge and secrets he had gained from plaintiff. The court said: "This action of the court is contended to be such an irregularity on its part as prevented the plaintiff from having a fair trial. It was within the power of the court, if satisfied that the attorney in question had acted on the plaintiff's side of the case on the former trial, to prohibit his acting on the other side in another trial. Weeks' Attys. s. 120. There can be no doubt, from the statement of the attorney to the court, that he proposed to act, and it is also certain that he did act, as an attorney and counsellor for the defendant in the trial of a cause where he had formerly acted for the plaintiff. The trial court

had a right, and it was its duty to have forbidden the attorney from changing sides in the same suit, though at different trials; for to do otherwise was "to defeat the very purpose for which courts were organized, viz., the administration of justice." *Wilson* v. *State*, 16 Ind. 392. The evidence in this case and the statement of the attorney himself was sufficient to show the court that his intention was, for the benefit of the defendant, to use at that time all the knowledge and secrets he had gained from his former client in preparing for and conducting one trial, and observing and watching the developments of two others. This court, speaking to such a question, says: "We are of opinion that the court in that case would have restrained him, even had he been unjustly discharged, and he was allowed, as contended, to be employed by the adverse party. The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor or counsellor from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law." *In re Cowdery*, 69 Cal. 50. The attorney himself boldly avowed his attention so to act. The court permitted him to do it, notwithstanding the plaintiff's objection. This we think was an error, and in the absence of any proof to the contrary, injury must be presumed to have resulted to the plaintiff, whereby he was prevented from having a fair trial of his case."—*Albany Law Journal.*

POWER OF SOLICITOR TO BIND CLIENT.—The counsel of record, representing married women in pending litigation, have an ample power to bind their clients in conducting and disposing of such litigation as have the counsel of other suitors, and decrees rendered with consent of counsel without fraud, are obligatory upon their clients, the consent of counsel being in law the consent of the parties they represent. There seems to be an opinion, which makes its appearance in records very frequently, that married women are privileged suitors; that when they come before the courts they come with a sort of shield against being bound in favour of their adversaries, and with the right to bind them in all matters whatsoever. Now this is a grave mistake. When a suitor comes into court, competent to select counsel, and does select counsel, no matter who the suitor may be, or how much married, the counsel is there for the purpose of representing the client, and whatever the counsel assents to the client assents to. There is full power on the part of the counsel to represent the client, and it is just the same as if the client were there in person; and it is no answer to a decree, a solemn judgment of the court, for the client to come in and say that the counsel misrepresented the client's interests, or did not represent the client's wishes. Let the client see that the counsel conforms to instructions, and if there is any injury by failure to do it, let the counsel answer for it, and not the other party. In this case, whatever gain was to this lady as against her adversary, was absolutely secured by the decree. The decree was carried into effect, and

she interposed nothing whatever in the way of an attack upon it, but merely presented a claim, after the advertisement had run, or was running; and because the sheriff disregarded her claim, she having had one claim, and it being disposed of by decree, she then files a bill against the sheriff after the sale was effected, and tries to prevent him from putting the purchaser in possession; and in that bill she makes no attack upon the decree, says nothing about it or against it in any way; and finally, when a bill is brought against her, she makes an answer to it, and says nothing about having the decree set aside, does not use her answer as a cross-bill, makes no prayer to vacate the decree, but afterward, when the case has been pending for years, from 1881, the time her first answer was filed, to 1887, she comes by amendment to her answer, with a cross-bill, attacks the decree in this feeble way, and prays that it be opened and set aside. Now thus much would not be done for any other suitor. There is no man who could avoid a decree for such cause as she sets up; then why should this lady be indulged in so doing? We dare not decide a question of right by a rule of courtesy, or substitute deference to sex for deference to law. The counsel of record, representing married women in pending litigation, have as ample power to bind their clients in conducting and disposing of such litigation as have the counsel of other suitors. And decrees rendered by consent of counsel, without fraud, are obligatory upon their clients, the consent of counsel being in law the consent of the parties they represent. A case very much in point is *Lewis* v. *Gunn*, 63 Ga. 542. Other relevant cases are *Mashburn* v. *Gouge*, 61 Ga. 512; *Glover* v. *Moore*, 60 id. 189; *Wingfield* v. *Rhea*, 73 id. 477. As to the powers of counsel, see *Wade* v. *Powell*, 31 Ga. 1; *Lyon* v. *Williams*, 42 id. 168; Ga. Sup. Ct., Jan. 16, 1888; *Williams* v. *Simmons*. Opinion by Bleckley, C.J.—*Albany Law Journal.*

DIARY FOR NOVEMBER.

1. Thur....Co. Ct. non-jury sittings in York. All Saints' Day. Sir Matthew Hale born, 1609.
3. Sat.....O'Connor, J., Q.B.D., died, 1887.
4. Sun.....*23rd Sunday after Trinity.*
6. Tues ...First intermediate examination.
8. Thur....Second intermediate examination.
9. Fri.....Prince of Wales born, 1841.
11. Sun.....*24th Sunday after Trinity.*
12. Mon....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
13. Tues....Ct. of Appeal sits. Solicitors' examination.
14. Wed....Barristers' examination. Falconbridge, J., Q.B.D., appointed 1887.
15. Thur....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
17. Sat.....Lord Erskine died, 1823, æt. 73.
18. Sun.....*25th Sunday after Trinity.*
19. Mon....L. S. Michaelmas Term begins. H.C.J. sittings begin. Armour, J., gaz. C.J., Q.B.D., 1887. Galt, J., gaz. C.J., C.P.D., 1887.
21. Wed....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
25. Sun.....*26th Sunday after Trinity.*
30. Moss, J. A., appointed C. J. of Appeal, 1877. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed 1887.

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

SEVENTH DIVISION COURT OF THE COUNTY OF ONTARIO.

SANDERSON (*Primary Creditor*) *v.* DUFFY (*Primary Debtor*) AND LONDON & LANCASHIRE INSURANCE CO. (*Garnishees before judgment*); AND TIFFIN (*Primary Creditor*) *v.* DUFFY (*Primary Debtor*) AND SAME COMPANY (*Garnishees after judgment*).

Foreign corporation—Service upon—Jurisdiction—Omission to dispute—D. C. Act, s. 182 *—Dominion Insurance Act—R. S. C.* 124.

Although under the Dominion Insurance Act, R. S. C. c. 128, a foreign insurance company must designate a chief place of business or agency in Canada for the service of proceedings upon them, such provision does not supersede, but is supplementary to, the enactments in the Division Court Act providing for service upon them in Ontario.

The omission of the garnishees to file a notice disputing the jurisdiction within the time prescribed conclusively confers jurisdiction, and such notice cannot be subsequently filed.

The garnishees, subsequent to the service upon them of the garnishee summons, paid to the primary debtor a sum much less than the sum insured, and as a compromise or settlement of a doubtful claim,

Held, that there was no garnishable debt at the time of service

[DARTNELL, J., Whitby, Oct. 23.

The primary creditor's claims were undisputed at the return day of the summons, on the 12th of May last, at which court the garnishees were not represented. The two summonses were served upon their nearest agent, one Bingham, at Orillia, who simply notified the clerk that he had no moneys in his hands, and omitted to notify the garnishees. The cases were adjourned as against them, and a direction made that they should retain any moneys payable by them until further orders. Thereupon they filed a notice disputing their liability and also the jurisdiction: and the cases came on again at the September court.

The primary debtor had taken out a fire policy in the garnishees' company for $400, $200 of which was on a house and $200 on his chattels. A fire occurred before these proceedings, and the company's inspector came out and stated his estimate of the loss at $270, and that probably the company's cheque for that sum would be forwarded in a few days. Between the May and September courts the company compromised the claim at $125, and paid over that sum to the primary debtor, inadvertently overlooking the previous order for the retention of the money. The claim was a doubtful one, it being alleged that the primary debtor was not the owner of nor had she any insurable interest in the house.

DARTNELL, JJ.—If the garnishees are a "body corporate not having their chief place of business within the Province," and if the service upon their agent, Bingham, binds them, then they are properly before the court: because, in Tiffin's case, the cause of action arose in this court, s. 185 (2); and because, in Sanderson's case, he recovered judgment therein (s. 182). An additional reason (still assuming that service upon Bingham was binding) is that the garnishees did not within the prescribed number of days after service upon him, serve a notice disputing the jurisdiction of the court. Sec. 176 provides that in default of such notice "the same (*i.e.*, jurisdiction) shall be considered established and determined."

Of course, if the garnishees are a "body corporate, not having their chief place of business within the Province," there is jurisdiction in this court, and the service is good: but if they cannot be so classed, their claim is

that they should have been served in one of the Toronto Division Courts, Toronto being the place where, under the meaning of secs. 181 and 185, they "live or carry on business."

They support this contention by a reference to R. S. C. c. 124, ss. 12, 13 and 16 (the Insurance Act), which provides that "every company shall, before the issue of a license to it, file in the Department of Finance . . . a power of attorney from the company to its agent in Canada, or (s. 13) such power of attorney shall declare at what place in Canada the head office or chief agency of such company is, or is to be, established, and shall expressly authorize such attorney to receive service of process in all suits and proceedings against such company, in any Province of Canada, in respect of any liabilities incurred by the company therein (s. 16). After filing such power in the manner and place directed, . . . any process in any suit or proceedings against any such company in respect of any liability incurred in any Province in Canada may be validly served on the company at its chief agency, and such services shall be deemed services on the company."

They further contend that this statute makes their chief office in Canada similar, to all intents and purposes, and the same, as the chief office of any Canadian company.

I do not agree to this. To do so, would be to concede that the license of the Finance Department confers upon, or attaches to, a foreign corporation the rights and liabilities of a domestic corporation. The Provincial Legislature has a right to regulate and prescribe the service of all legal process upon such corporations; and, so far from the Dominion Act superseding or controlling the Provincial Act, it appears to me to simply afford an additional manner of serving process upon them. The Dominion authorities in effect say, "We grant you a license to carry on business in Canada, on condition, among other things, that you accept service of process from *any* court of *any* of the *Provinces*, and some *locus designatus* within *Canada*." Under this view, it further appears to me that, if service in these garnishee proceedings had been made upon the chief agent for Canada, it might be contended, with some show of force, that service upon an officer of the Company in Toronto, would dispense with service upon Bingham, the nearest agent. I distinctly am of opinion that under the Dominion Act, a "chief office or agency is not created or allowed for all purposes, but only for providing a place where service of process can, without delay or expense, be speedily and effectually made.

The primary creditors claim that the question of jurisdiction is concluded by the garnishees' omission to file a notice disputing the jurisdiction, within the proper time, as required by section 176. Through the ignorance, neglect, or stupidity of their agent, Bingham, their officials had no actual notice of these proceedings until the very day appointed for the hearing of the causes. The language of section 176 is very strong: "If this notice is not given within the prescribed time, the judge has no power to extend the time for giving it" (Sinclair, D. C. A. 1888, page 202). I do not dissent from this, but in garnishee cases (sec. 198), the powers of a judge are most extensive as to amending, adjournment, etc. It may be said, however, that the wording of the latter section cannot be extended to notices disputing the jurisdiction, but is confined to giving time for putting in omitted notices of defence.

Having generally inquired into the question of jurisdiction, and having found that I have jurisdiction, it is now necessary to ascertain and find whether there is any debt due to the primary debtor, which is the subject of garnishment.

I do not think that it was necessary to give strict proof that the defendants are a foreign corporation—that is a matter of common knowledge and notoriety. It so appears upon the face of their policies, in their published advertisements and circulars, and, if more was needed, the *Canada Gazette* periodically gives notice that they are licensed to do business in Canada as such.

The points of these cases were very imperfectly and carelessly adduced before me. Bingham, the agent, was not called by either party; the application and policy were not produced; nor were the claims papers or any resolution or authority from the garnishees, directing a settlement or final adjustment of the loss. From such documents as were produced, from such evidence as was offered, but chiefly from the statements and arguments of

the solicitors or agents who appeared, I find the following as facts: (1) The garnishees are a foreign corporation doing business in Ontario, and are properly before the court; (2) They issued a policy of $400, insuring the primary debtor against loss by fire—$200 on her house, and $200 upon its contents; (3) That the primary debtor had no insurable interest in the house; (4) That during the currency of the policy, and before these proceedings, a fire occurred, by which the subject matters of the insurance policy were destroyed; and that the company's inspector made an estimate of the loss at $270, and informed the primary debtor that she would receive a cheque for the amount within a few days; (5) That after knowledge and notice of these proceedings, and of a direction by the court not to pay without further order, the garnishees paid over to the primary debtor the sum of $125, in full satisfaction of their claim.

The garnishees allege, but did not prove, that they paid the latter sum *ex gratiâ*, and not *ex delictò*, to compromise and get rid of a doubtful claim, and not because there was any debt due and owing at the time of garnishment, which could be made the subject of garnishment.

I think this objection must prevail. The policy is a mere contract of indemnity. At the date of the service of the garnishee summons there was no "debt due and owing" by them to the primary debtor. She had a cause of action against them for unliquidated damages, and no more. Even if her damages had been assessed by a jury, the amount of the verdict would not become a "debt" until judgment be entered. The payment subsequently by the garnishees does not, to my mind, affect the case. The company had a right to resist the claim, or to compromise it for a small sum, rather than risk litigation with a person of no means, and incur costs to a greater amount than the sum she was willing to accept. I refer to *Boyd* v. *Haynes* (*British North American Insurance Company, Garnishees*), 5 P. R. 15, and the cases there cited, as being conclusive on this point.

I dismiss the action as against the garnishees. I make no order as to costs.

Evans (Orillia), for Macdonald.

McCarthy, Osler & Co. (Toronto), for the garnishees.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

SEELEY *v.* WELLES.

Contract.

Where a person agrees to take a machine and try it, and, if it works to suit him, to buy it, he may reject it, though his objections may seem unreasonable to others, if his objection is made in good faith, and is not merely capricious.

Error to Common Pleas of Bradford County.

Hall and *McPherson*, for plaintiff in error.
Califf and *Williams*, for defendant in error.

CLARK, J.—This suit was brought to recover the first instalment on an alleged contract for the sale of an Osborne reaper and binder. The principal controversy arises out of a disagreement as to the nature and terms of the contract. The plaintiff, on the one hand, alleges that the sale was absolute; that the machine was to be set up and tried, and was to work well, that it was put up on trial, and was accepted by Seeley; that the terms of the contract were fixed, and the time and manner of payment fully agreed upon. The defendant, on the other hand, maintains that he was to try the machine, and if it worked to suit him, and he could use it satisfactorily on his land, of which he was to be the judge, he was to take it upon the terms agreed upon; that upon trial it was not satisfactory, and he returned it to Welles. Both parties were to some extent corroborated by other witnesses, but the testimony was contradictory and conflicting; and it was for the jury to determine the true state of the facts.

In the general charge the learned judge of the court below instructed the jury as follows: "If you believe the evidence on the part of the plaintiff, particularly of Espy and Bradley, as to what occurred at the hammock, then there was a complete contract, and the plaintiff would be entitled to recover. If, on the other hand, you believe the evidence on the part of the defendant, that he was to take the machine and try it, and that he was not to keep it unless it worked to his satisfaction, then the plaintiff cannot recover, provided you find that the machine did not work well, and that he had reasonable cause to be dis-

satisfied with it. But if the machine did good work, he could not say, 'I have made a bad bargain; I am not satisfied,' and return the machine. In other words, there must have been a reasonable cause for his dissatisfaction, and the return of the machine must have been in good faith. . . . There is a great disagreement in the testimony of the witnesses for the plaintiff and the defendant, upon this subject, and you will have to determine, from all this evidence, whether the working of the machine was such as to give Mr. Seeley reasonable cause to be dissatisfied with it, or whether it worked well, according to the agreement and warranty, as testified to by the plaintiff and his witnesses. You will now take this case and give it your careful consideration, and render such a verdict as will do justice between the parties."

In this instruction of the court to the jury, we think there was error. If the defendant's theory of the case, on the facts, is accepted, it is plain that although the reaper may have worked well in the opinion of those who saw it, yet, if it did not work to the satisfaction of the defendant, he was not obliged to take it; he testified that he told Espy he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself. He complains that it was too heavy; that it weighed nearly 200 pounds more that it had been represented to weigh; that his horses could not haul it; and that, in his judgment, it did not do the work well, etc. His objections to the reaper may have been ill founded; indeed, they may have been in some sense unreasonable, in the opinion of others; yet if they were made in good faith, he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved?

What the learned court said to the jury on this point was equivalent to saying that although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought that he ought to have been satisfied, he was bound to take it; whereas, if the defendant's testimony is true, he was to judge of the merits of the machine himself, and not the bystanders nor the jury; and if he exercised his own judgment, in good faith, in the refusal to accept it, he was certainly not bound for the price.

The case is ruled by *Singerly* v. *Thayer*, 108 Pa. St. 291, where the authorities are collected, and the legal principles involved fully discussed. What has been said is of course applicable to the case only in the event that the jury in the re-trial of this case shall accept the defendant's theory as the correct one; for if the evidence on the part of the plaintiff is believed, the contract was complete. Upon this question, as we have said, the testimony is conflicting. We have purposely refrained from any discussion of the facts, out of which the principles of law governing the case arise, fearing that any reference to the testimony, in detail, might have a misleading effect. It is of the highest importance, in such a case as this, that the jury should be left entirely free to consider and determine the facts upon their own judgment.

The judgment is reversed, and a *venire facias de novo* awarded.—*American Law Register.*

NOTE ON ABOVE CASE BY THE EDITOR OF THE "AMERICAN LAW REGISTER."

Where a person undertakes to manufacture an article or deliver goods which he guarantees shall be satisfactory to the buyer, the purchaser is sole judge whether the article is satisfactory, and there is no remedy left for the seller, where the purchaser is not satisfied; *McClure* v. *Briggs*, 58 Vt. 82.

In the case of *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, the Circuit Court of the United States (Dist. Cal. Sept. 7, 1885) says: "The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser it must be satisfactory to him, or he is not required to take it. It is not enough to be satisfied with the article; he must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be judge; and if he deliberately enters into such an agreement, he must abide by it. To this effect, *Hallidie* v. *Sutter St. R. R. Co.*, 63 Cal. 575; *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v.

Foster, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Wood Reaping Machine Co.* v. *Smith*, 50 Id. 565; *Heron* v. *Davis*, 3 Bosw. (N.Y.), 336; *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42; *Gray* v. *Central R. R. Co.*, 11 Hun. (N.Y.), 70.

Thus, where one undertakes, "to satisfaction," to make a suit of clothes, *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; to fill a particular place as agent, *Tyler* v. *Ames*, 6 Lans. (N.Y.), 280; to mould a bust, *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; or paint a portrait, *Gibson* v. *Cranage*, 39 Mich. 49; *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42; *Moore* v. *Goodwin*, 43 Hun. (N.Y.), 534; he may not unreasonably expect to be bound by the opinion of his employer, honestly entertained; and neither the opposite party nor the jury can decide that he ought to be satisfied with the article made: *Moore* v. *Goodwin*, 43 Hun. (N.Y.), 534. See *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 565.

Thus, it has been held, that a contract to erect a patent hydraulic hoist, "warranted satisfactory in every respect," constitutes the purchaser sole judge of its fitness, and does not mean that it should be such as would satisfy other persons, or that the promisee reasonably ought to be satisfied with it: *Singerly* v. *Thayer*, 108 Pa. St. 291. And where the contract under which work is done provides for approval by a third party, no right to money earned or cause of action accrues until that party's certificate is procured: *Kirkland* v. *Moore*, 40 N. J. Eq. 106; *Tetz* v. *Butterfield*, 54 Wis. 242; *Oakwood Retreat Association* v. *Rathbone*, 65 Id. 177. But where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, the contract has been fully performed by the vendor, and the purchaser is bound to accept the article: *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, *supra*. Thus it was held in *Lynn* v. *Baltimore & O. R. R. Co.*, 60 Md. 404; s. c. 45 Am. Rep. 641, that on a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves of the goods.

In Connecticut, in the case of *Zaleski* v. *Clark*, 44 Conn. 418; s. c. 26 Am. Rep. 446, where a sculptor undertook to furnish a bust to the satisfaction of the defendant, who refused to accept the work, when done, though in fact a fine piece of workmanship, the Supreme Court held that there could be no recovery. The court says: "A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied, is quite another thing. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it." See also *Gibson* v. *Cranage*, 39 Mich. 49; *Gray* v. *Central R. R. Co. of N. J.*, 11 Hun. (N.Y.), 70.

The case of *Zaleski* v. *Clark*, *supra*, is founded upon *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139.

In Massachusetts, in a case where the plaintiff undertook to make a bookcase for a society, which was to be to "the satisfaction" of the president, the court says: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labour and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief:" *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139. And this case was subsequently followed in *Brown* v. *Foster*, 113 Mass. 139; s. c. 18 Am. Rep. 463, where the court says: "Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

In Michigan, in the case of *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 555, which was a suit for the contract price of a machine warranted to be satisfactory to the defendant, it was held that "a stipulation in a contract of sale that it shall be of no effect unless the goods are satisfactory, is to be construed according to the circumstances, as re-

serving to the promisor the absolute right to reject them without giving any reason, or as binding him to decide on fair and reasonable grounds. In one case, his conclusion cannot be reviewed, but it can be in the other." The court says that "the cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class, the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course; and all right to inquire into the grounds of his action and overhaul its determination is absolutely excluded from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option and is not willing to leave his freedom of choice exposed to any contention, or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain upon the condition of reserving the power to do what others might regard as reasonable. The following cases sufficiently illustrate the instances of the first class: *Zuleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Hart* v. *Hart*, 22 Barb. (N.Y.), 606; *Tyler* v. *Ames*, 6 Lans. (N.Y.), 280; *Rossiter* v. *Cooper*, 23 Vt. 522; *Taylor* v. *Brewer*, 1 Maule & Sel. 290. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness, and the adequacy of the grounds of it, are open considerations, and subject to the judgment of judicial triers."

Among the cases applying to this class are, *Daggett* v. *Johnson*, 49 Vt. 345, and *Hartford Manufacturing Co.* v. *Brush*, 43 Vt. 528.

In New York, where the plaintiff repaired and set up the boilers for the defendant, under the contract that he was not to be paid, until the defendants were satisfied that the "boiler as changed was a success," defendants claimed that they alone were to determine the question whether they were satisfied that the boiler as changed was a success. The court held that this was error, where the work was completed according to contract, and the defendants used it without objection or complaint. The time for payment had come and the plaintiff had a right of action for the contract price in case payment was refused. The reason upon which this was founded seems to be, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with": *Duplex Safety Boiler Co.* v. *Garden*, 101 N. Y. 387; s. c. 54 Am. Rep. 709. In *Folliard* v. *Wallace*, 2 Johns. (N.Y.), 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150 three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded."

This decision was followed in *Miesell* v. *Globe M. L. Ins. Co.*, 76 N. Y. 115, and *Brooklyn* v. *Brooklyn R. R. Co.*, 47 Id. 475.

In Pennsylvania, it was held, in the recent case of *Singerly* v. *Thayer*, 108 Pa. St. 291, that a contract to furnish an article which shall be satisfactory to the purchaser, is not complied with by proof that the article furnished is made in a workmanlike manner, and per-

forms its intended purpose in a manner which ought to be satisfactory to the purchaser. The contract in this case was to erect an elevator "satisfactory in every respect," and the court held the meaning of the language used to be that the elevator, when erected, should prove satisfactory to the person for whom it was erected. As a matter of fact, the elevator did not prove satisfactory, and suit was brought on the contract for the price. The court says: "When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove that he ought to have been satisfied. It was so where the contract was for the purchase of a steamboat:" *Gray* v. *Central R. R. Co. of N.J.*, 11 Hun. (N.Y.), 70; where the agreement was to make a suit of clothes: *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; on a contract for a plaster bust of the deceased husband of the defendant: *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; where a portrait was to be satisfactory to the defendant: *Gibson* v. *Cranage*, 39 Mich. 42; and where a portrait of defendant was to be satisfactory to his friends: *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42.

In Vermont, in the case of *McClure* v. *Briggs*, 58 Vt. 82, where A set up an organ in B's house, upon an agreement that B should keep it and pay for it, if it proved satisfactory to him, B thought without cause, that he was dissatisfied, and notified A. The court held that, provided he acted in good faith, he was the sole judge as to his satisfaction with the organ. The court says: "He was bound to act honestly, and to give the instrument a fair trial, and such as the seller had a right, under the circumstances, to expect he would give it, and herein to exercise such judgment and capacity as he had, for, by the contract, he was the one to be satisfied, and not another for him. If he did this, and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and the plaintiffs have not fulfilled their contract, and all these elements are gatherable from the report. This is the doctrine of *Daggett* v. *Johnson*, 49 Vt. 345, and of *Hartford Manufacturing Co.* v. *Brush*, 43 Id. 528. In the former case, the defendant was required to bring to the trial of the evaporator only honesty of purpose and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. The case turned on an error in the admission of testimony, but Judge REDFIELD goes on to discuss the merits of the case, somewhat following substantially in the line of Brush's case, and citing it as authority. But *Daggett* v. *Johnson* is distinguishable in its facts from Brush's case, and from this case, in that the defendant omitted to test the pans in the very respect in which he knew it was claimed their excellence consisted."

In Wisconsin, in the case of *Tetz* v. *Butterfield*, 54 Wis. 242, it is said, that where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith. And in *Glasius* v. *Black*, 50 N. Y. 145, where by the terms of a contract for repairing a building it was provided that the materials to be furnished should be of the best quality and the workmanship performed in the best manner, subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the work to be paid for "when completely done and accepted," it was held that the acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work, or inferior materials, from those contracted for, bind the owner to pay for them; that the provision for acceptance was merely an additional safeguard against defects not discernible by an unskilled person. And in the recent case of *Oakwood Retreat Association* v. *Rathbone*, 65 Wis. 177, it was held that when a contract provides for the performance of work at at a stipulated price, to the satisfaction of an architect named therein, who is employed to adjust all claims of the parties to the agreement, and a bond is given to secure a faithful performance of the contract, where the party agreeing to do the work does not fully perform such contract, the other party may sue the principal and sureties on the bond for a breach of the contract, before the architect has adjusted any claim arising out of the breach.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Armour, C. J.] [Oct. 5.

In re BOBIER AND ONTARIO INVESTMENT ASSOCIATION.

Vendor and purchaser—Requisitions—Certified copies of deeds—Removing clouds on titles—Lis pendens—Power of attorney—Compensation for deficiency in land sold.

Upon a petition under the Vendor and Purchasers Act,

Held, 1. Following *McIntosh* v. *Rogers*, 12 P. R. 389, that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title, which the vendors were unable to produce. The statute 10 Anne, c. 18, does not bear such analogy to our registry laws as to make *Cooper* v. *Emery*, 1 Phil. 390, an authority to the contrary.

Held, 2. That the purchasers were entitled to have removed from the registry as clouds upon the title: (*a*) A certain certificate of *lis pendens* in an action upon a mortgage which appeared by the registry to be discharged, because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage; (*b*) A second certificate of *lis pendens*, in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it, because the vendors, and, if the title passed, the purchasers, might be added as parties; (*c*) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling, because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all, before the vendors obtained title.

Held, 3. Upon the evidence, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title.

Hoyles, for the petitioners, the purchasers.

W. R. Meredith, Q.C., for the vendors.

Armour, C. J.] [Oct. 12.

LE MAY *v.* MCRAE.

Award—Motion to set aside—Conduct and jurisdiction of arbitrator—Draft award—Admissions of arbitrator—Revoking submission—Discovery of new evidence.

Action upon a sub-contract for railway construction. Motion by the defendants to set aside the award of an arbitrator, made upon a reference to him without provision for appeal, upon the ground that the arbitrator illegally and in excess of his jurisdiction received evidence of a verbal contract or understanding between the plaintiffs and defendants varying the written contract, and awarded payment to the plaintiffs for the timber supplied to the defendants not by board measure, as required by the written contract, but upon a different system of measurement; and upon the ground of the discovery of new evidence, that of one B., and the absence of a material witness, one M.; and upon grounds disclosed in the papers filed, and especially in the memorandum or draft award showing the grounds upon which the award was arrived at.

Held, that the award being good on its face, and the draft award not being delivered with or accompanying the award, the case did not come within the exception stated in *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189.

Admissions made by the arbitrator, upon which his award was founded, in conversation with the defendants' solicitors, were not available for the purpose of setting aside the award (see *Dinn* v. *Blake*, L. R. 10, C. P. 388); nor could the draft award or memorandum be any more available for such purpose than the oral admissions of the arbitrator.

Re Don Valley Railway Co., L. R. 6, Eq. 429, distinguished.

East and West India Docks Co. v. *Kirk*, 12 App. Cas. 738, in which it was held that the court had jurisdiction to revoke the submis-

exchange, and also to set aside a conveyance as fraudulent, an order was made under Rule 739 for judgment on the money demand, with leave to proceed upon the other claim.

Huffman v. *Doner*, 12 P. R. 492, followed in preference to *Standard Bank* v. *Wills*, 10 P. R. 159.

Hoyles, for the plaintiff.

No one for the defendant.

MacMahon, J.] [Oct. 1.

REGINA *v.* LAVIN.

Warrant of commitment—Conviction—Variance—Motion to discharge prisoner—Enlargement—R. S. C. c. 176, s. 24.

In determining upon a motion to discharge a prisoner whether a warrant of commitment is defective, the court cannot, in view of the Summary Trials Act, R. S. C. c. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction.

Cases cited by WILSON, C.J., in *Arscott* v. *Lilley*, 11 O. R., at p. 167, referred to.

And where the conviction alleged that the offence was committed in January, 1887, and the commitment January, 1888, the motion was enlarged accordingly.

Badgerow, for the Crown.

Bigelow, for the prisoner.

Boyd, C.] [Oct. 1.

WOLF *v.* OGILVY—*In re* HAGAR.

Lunacy—Intervention of official guardian—Consolidated Rules 335 to 338—R. S. O. (1887), c. 44, s. 32.

Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant, and obtaining an order of the court by procedure analogous to that provided by Consolidated Rules 335 to 338.

But where a person has been found by the court to be of unsound mind, the official guardian may be served without order or notice to the lunatic.

Sec. 32 of R. S. O. (1887), c. 44, must be limited to causes mentioned in the marginal note thereto, which correctly defines the scope of the enactment.

Langton, for the plaintiff.

J. Hoskin, Q.C., for the lunatics.

W. Barwick, for the curator of the lunatic, Hagar.

Boyd, C.] [Oct. 3.

In re HORNIBROOK.

Sale of land—Order of court in infancy matter—Default of purchaser—Re-sale.

In a matter pending before the court concerning the sale of infants' lands, an order was made directing the acceptance of an offer to purchase the lands. The purchaser having made default, the Master in Chambers made an order for payment of the purchase-money, and in default for a re-sale, and payment by the purchaser of any deficiency.

An appeal from this order on the grounds that the contract provided a penalty for default, viz., forfeture of the deposit, and that the practice followed was not the proper one, as the sale was not under the standing conditions of the court, was dismissed.

Masten, for the purchaser.

Beck, for the vendors.

Armour, C.J.] [Oct. 4.

CUTLER *v.* MORSE.

Costs—Unnecessary counter-claim.

To an action on a building contract the defendant set up the defence that the work was incompletely and unskilfully done, and counter-claimed for damages by reason thereof. The Master to whom the action was referred found that $177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the plaintiff had suffered damage to the extent of $177.

Held, that the questions raised by the defendant might have been raised before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he set up was properly a counter-claim.

W. M. Douglas, for the plaintiff.

Middleton, for the defendant.

Robertson, J.] [Oct. 8.

WHITE *v.* RAMSAY.

Action for recovery of land—Joinder of other causes of action—Consolidated Rule 341.

The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Consolidated Rule 341.

Upon a motion by the defendant to set aside the writ of summons, the Master in Chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs.

ROBERTSON, J., on appeal, upheld the Master's order.

Hoyles, for the defendant.

C. J. Holman, for the plaintiff.

Armour, J.] [Oct. 9.

MCLEOD *v.* SEXSMITH.

Judgment under Con. Rule 756—*Stage of action when ordered—Admissions in letters.*

An application for judgment under Rule 756 cannot be made until the right of the party applying to the relief claimed has appealed from the pleadings.

And an order made under that rule before the delivery of any pleading in the action based on admissions in letters, was set aside.

T. Langton, for the plaintiff.

C. J. Holman, for the defendant.

Mr. Dalton.] [Oct. 12.

ELLIOTT *v.* CANADIAN PACIFIC RAILWAY CO.

Evidence—Sole witness of accident giving rise to action—Examination before trial.

In an action under Lord Campbell's Act an order was made for the examination before the trial *de bene esse* on behalf of the plaintiff of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness.

J. H. Ferguson, for the plaintiff.

D. Armour, and *W. H. Wallbridge*, for the defendants.

Boyd, C.] [Oct. 16.

FOSTER *v.* VANWORMER.

Judgment debtor—Examination—Duty of debtor—Unsatisfactory answers—Notice of motion to commit.

It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out as best they may what it is the business of the debtor to make clear.

Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he has the means at hand to qualify himself to explain.

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of.

Precision should be used on the examination in ascertaining the exact state of facts, as shown in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the judge can only look at what is proved or admitted.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense, and to pay the costs of the motion.

Ex p. Bradbury, 14 C B. 15, and *Ex p. Moir*, 21 Ch. D. 61, followed.

Crooks v. *Stroud*, 10 P. R. 131; and *Lemon* v. *Lemon*, 6 P. R. 184; and *Hobbs* v. *Scott*, 23 U. C. R. 619, discussed.

A. R. Creelman and *Macrae*, for the motion.

Walter Barwick, contra.

Boyd, C.] [Oct. 16.

MCLEAN *v.* BRUCE.

Examination—Proof of service of appointment and payment of conduct money—Examiner's certificate—Waiver.

Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination, upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not show that due service of subpœna and appointment and payment of conduct money had been made.

Semble, the certificate of the examiner as to these points would not have been sufficient; and

Held, that in the absence of evidence it was not to be inferred, from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not, by such attendance, waive his right to have the service and payment proved.

H. Cassels, for the plaintiff.

F. C. Moffatt, for the defendant.

Boyd, C.] [Oct. 16.

HALL *v.* GOWANLOCK.

Discovery—Libel—Privilege—Answers tending to criminate—Costs.

No man can be compelled to answer a question incriminating himself. And where the defendant, upon his examination for discovery in an action of libel, refused to answer questions as to the authorship of the alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him;

Held, that he was entitled to the privilege, and that he was not too late to claim it. The costs of the motion to commit were made costs to the plaintiff in the cause.

Law Students' Department.

THE following papers were set at the Examination of the Law Society before Trinity Term, 1888.

SECOND INTERMEDIATE.

REAL PROPERTY.

1. What is the difference between the covenants for title in a statutory form of deed, and those in a statutory form of mortgage?

2. How is an estate tail barred? Explain fully.

3. What is meant by merger of estates? Explain fully the requisites of merger.

4. How long has a mortgagee within which to sue on the covenant in his mortgage, and how long within which to recover the land, after default?

5. What is a contingent remainder? Give examples of the different contingencies upon which it may depend?

6. What are the rules as to creation of remainders?

7. What are the requisites of a deed?

BROOM'S COMMON LAW AND O'SULLIVAN'S GOVERNMENT IN CANADA.

1. Explain the writ of *prohibition*, and state in what cases it will be granted.

2. What is the meaning of the phrase *transit in rem judicatam?*

3. Into what three great heads are bailments usually divided? and what is the essential difference between them as to the liability of the bailee?

4. Explain the difference between *natural* and *local allegiance.*

5. Under what circumstances does the appropriation of *lost goods* by the finder amount to larceny?

6. Explain the difference between *larceny* and obtaining goods by *false pretences.*

7. What legislative powers, if any, has the Legislature of Ontario in criminal matters?

EQUITY.

1. What is meant by the term advancement? State generally in whose favour it will, and in whose favour it will not be raised.

2. State the requisites in a will to create a valid trust.

3. Explain and illustrate by an example the maxim that Equity acts *in personam.*

4. Is there any difference between the right of a trustee purchasing from his *cestui que trust* and a solicitor buying from his client? If so, distinguish between them.

5. A person imagining he is about to die, hands to A his cheque for $1,000. Explain the effect of his gift.

6. Define the classes into which legacies are divided, giving an example of each.

7. Into what various heads has constructive fraud been divided?

PERSONAL PROPERTY—JUDICATURE ACT.

1. A and B are jointly liable to C on a bond. A dies, leaving D executor of his estate. B

subsequently dies, leaving E executor of his estate. Who is liable to C for the debt? Why?

2. Explain the term *liquidated damages*. Distinguish from penalty.

3. Stock is settled in trust for A for life, and after his decease in trust for his executors and administrators. What is the effect? Why?

4. A appointed B his executor. When A dies, B is a minor. What is the result on the executorship?

5. What is the difference between *set-off* and *counter-claim* in an action?

6. What is the procedure to obtain a new trial in jury cases?

7. On a change of interest in an action, how can the necessary change be made in the parties to the action? State how the parties affected by the procedure may attack such procedure.

REAL PROPERTY.—HONOURS.

1. What objections are there to the power of sale contained in the statutory form of mortgage?

2. What is an estate upon condition? Give examples of the different kinds of such estates.

3. What is the difference between primary and secondary conveyances? Exemplify.

4. Define *dominant tenement*, *servient tenement*, *easement*.

5. What was the effect of using the words "die without issue" in a devise of realty, and how has it been effected by statute?

6. An infant purchases land and dies, are his representatives bound to accept the land, and pay the purchase-money if unpaid? Why?

7. What is the effect of a statutory discharge of mortgage before and after registration?

BROOM'S COMMON LAW — O'SULLIVAN'S GOVERNMENT IN CANADA.—HONOURS.

1. What is the rule as to the suspension of the civil remedy against a wrong-doer when the act done is a felony? and what statutory exception is there to the rule?

2. In what cases does the law deny a remedy for an injury from motives of *public policy?*

3. Explain the law as to the criminal responsibility of a married woman.

4. Explain the meaning and effect of *privileged occasion*, in an action of slander or libel.

5. State the true doctrine of *contributory negligence*, as a defence to an action at law.

6. Discuss briefly the question of the necessity for *privity* in an action *ex delicto*.

7. State the necessary qualifications for a Dominion Senator.

EQUITY.—HONOURS.

1. In what cases of contract is silence tantamount to direct affirmation?

2. State the law governing satisfaction of legacies by subsequent legacies: (1) where the legacies are by the same instrument; (2) where the legacies are by different instruments.

3. Distinguish between the rules of Equity in dealing with executory trusts in marriage settlements and those in wills, respectively.

4. A testator bequeaths $10,000 by will to such charitable uses as he shall direct by codicil annexed to the will—there is no codicil. What is the effect of such bequest? Reasons for answer.

5. Under what circumstances may a plaintiff be entitled to specific performance of a written contract with a parol variation?

6. What various remedies are open to a *cestui que trust*, where a trustee has wrongfully converted the trust property?

7. A and B are partners, the period of whose partnership has not expired. A comes to court seeking a dissolution; on what grounds can he succeed?

PERSONAL PROPERTY—JUDICATURE ACT.—HONOURS.

1. A grants to B all goods which he now has or may hereafter have in his dwelling-house. How far is this grant valid?

2. A is indebted to B, and wishes to put B in the position of being a judgment creditor. How can he do so without an action being commenced by B?

3. How far can a party to a submission to arbitration revoke such submission?

4. A bequest of personal property is made to A, but to be forfeited if A marry without C's consent—then to go to B. What is the effect?

5. What is the rule as to the recovery of

stolen goods by the owner as against a purchaser of such stolen goods?

6. A desires to sue the firm of B and Co. What provision is there by virtue of which he can ascertain who are the members of the firm?

7. A writ of summons cannot be served until after one year from its date. How could it have been kept alive?

Miscellaneous.

CAUSE AND EFFECT.—"I hear," said somebody to his friend, "that Smith the lawyer is dead, and leaves very few effects." "He could scarcely do otherwise," was the response; "he had so very few causes."

THE LAWYER'S BEST FRIEND.—At a certain law society's dinner not long ago the president called upon the oldest member of the bar to give as a toast the person whom he considered the best friend of the profession. "Certainly," he replied; "the man who makes his own will."

SENTIMENT AND BUSINESS.—Young man: "I cannot see, sir, why you permit your daughter to sue me for breach of promise; you remember that you were bitterly opposed to our engagement because I was not good enough for her, and would disgrace the family." Old man: "Young man, that was sentiment; this is business."

DISSENTING OPINIONS.—We notice from the current reports that they have taken to filing dissenting opinions in Massachusetts. We have understood that it had been for many years the practice of the Supreme Judicial Court of that State to suppress any knowledge of dissenting opinions; so that every opinion, although that of a bare majority of the judges, carried with it the force of the united opinion of the full bench. A good many lawyers think that the dissenting opinions ought not to be filed; but the argument against dissenting opinions proves too much, for it is equally an argument against all opinions.—*American Law Review.*

HE WOULD REFORM GRADUALLY.—A ward statesman, whose testimony was needed in a case of election frauds, was about to be sworn. "Do you solemnly swear," said the court, "to tell the truth, the whole truth, and nothing but the truth, so ——" "Hold up, Judge," interrupted the witness, "can't you mitigate that sentence just a little. You know I have been in politics a good long time."

A SUGGESTION TO REPORTERS AND AUTHORS.—It is strange that reporters and legal authors have never had the practical sense to put at the top of each left-hand page the name of the reports, together with the volume, so that the practitioner can accurately cite the case without turning the book over to look at the back. But two or three instances are known where reporters and authors have had the sense to do this.—*American Law Review.*

NOT QUITE READY.—A good story is told of a lawyer at Boston, who was noted for his desire to put himself on a friendly footing with the jury. An old and severely virtuous lawyer was opposed to him in a case, and there was apparently some unnecessary delay on the part of the latter in beginning his case. "Well, gentlemen, why don't you begin?" said the court; to whom the old lawyer replied, "I perceive, your honour, that there is one member of the jury with whom my learned friend has not yet shaken hands. If he will shake hands with him, we will be ready to go on."

Appointments to Office.

COUNTY JUDGES.

Elgin.

John McLean, of St. Thomas, Deputy Judge of the County Court.

Hastings.

S. S. Lazier, of Belleville, Deputy Judge of the County Court.

THE *Illustrated London News* (American Edition) comes with regularity. It is a faithful reproduction, in New York, of the well-known English illustrated periodical.

The Canada Law Journal.

VOL. XXIV. NOVEMBER 16, 1888. NO. 18.

THE recent consolidation of the Statutes and Rules of Practice renders a new annotated edition of the Judicature Act and Rules almost a necessity for the practitioner. We understand that Mr. Holmested, the Registrar of the Chancery Division, and Mr. Thomas Langton, who are both favourably known to the profession for their previous works on the practice, have combined their forces, and intend shortly to publish an annotated edition of the Judicature Act and Rules, which, we doubt not, will prove a valuable and useful addition to our legal literature.

AN extraordinary case of contempt of court comes from the Bahama Islands, where a prisoner, after sentence had been pronounced upon him for some offence, savagely assaulted the Chief Justice on the bench. Four days afterwards the Chief Justice was sufficiently recovered from the attack to sentence the prisoner for this contempt of court, to receive "thirty lashes, and to be held in penal servitude for his natural life," which goes far to show the wisdom of the rule of law which says that "No man is to be a judge in his own cause," and the folly of permitting judges to make the only exception to that rule.

THE establishment of a Chair of Political Science in the University of Toronto marks a new era in the development of university education in this Province and, indeed, in Canada. Professor Ashley's inaugural lecture, with which our readers are already familiar through the reports in the daily press, was an able vindication of the claims of the latest department recognized in our university curriculum to the place so tardily accorded to it. As the learned lecturer pointed out, the presence of a large number of people, taking an active part in politics, who have given serious and honest attention to questions of government, and are determined to make their influence felt, is essential in a democratic government. We sincerely trust that the new Chair may be the means of directing young Canadians to the study of politics by scientific methods, with the calm deliberation used in the investigation of problems in biology or optics, for example. If this result is attained with those who graduate in this department, the tendency must inevitably be to raise politics out of the mire into which blind zeal has dragged everything savouring of political parties, and to make intelligent thought, independent of factions, more respected. While we rejoice in the advancement already made in university work, we look forward to the establishment of a faculty of law, with the hope

that the time has almost arrived when more ample facilities will be provided for the instruction of those who intend to devote themselves to the study and practice of the law. The legal faculty and the department of political science must, from their nature be closely connected, and we understand that instruction in the former will soon be provided. The curriculum has not yet been made public, but those who have the means of knowing, regard the choice and arrangement of subjects as excellent. Lectures thereon will, we understand, soon be provided.

CHANGES ON THE BENCH.

The vacancy in the Supreme Court caused by the death of the late Mr. Justice Henry has been filled, as already announced, by the appointment of Mr. Justice Patterson, of the Ontario Court of Appeal, and his place has been taken by Mr. James Maclennan, Q.C.

In reference to Mr. Justice Patterson—he has been so long before the public and the profession in a judicial position that we merely refer to the fact of his appointment, and congratulate him upon his promotion.

The appointment of Mr. Maclennan to the Bench is no surprise to the profession. The only surprise is that he was not appointed long ago, a view already expressed in these columns. The appointment is one of the very best that could have been made. A man of the highest personal character, Mr. Maclennan is, as our judges should be, without fear and without reproach. He is a sound and able lawyer, has had long experience at the Bar, has a judicial mind with a large fund of common sense, and is thoroughly familiar with the business of the country and the instincts of the people. At the same time he has not lost his interest in art and general literature, and few men at the bar have read more of our English classics.

Mr. Maclennan is a Canadian, having been born in 1833 in the county of Glengarry, a county which has produced many eminent men and good lawyers. He graduated at Queen's College, where he received his education, in 1849, at the early age of sixteen years. Having chosen the law as his profession, he commenced its study in the office of Mr. (now Sir) Alexander Campbell, in the city of Kingston, where he was an intelligent and industrious student. He was called to the Bar with honors in Michaelmas Term, 1857. We understand that for a short time previous to commencing the study of the law he taught school, a training most valuable to one desiring to excel in a profession where patient plodding is an essential, and which largely calls into requisition a knowledge of human nature.

Mr. Maclennan commenced the practice of his profession in the city of Hamilton, where he remained, however, for only two years, removing to Toronto in 1859, where he entered into partnership with the Hon. Oliver Mowat, then one of the leaders of the Bar on the Equity side. He has remained in Toronto in the same professional connection ever since. In 1871 he was elected a

Bencher of the Law Society, and we are bound to say that if the Law Society owes anything to any single individual amongst their governing body they owe a debt of gratitude to Mr. James Maclennan. His duties there have been performed with the most painstaking industry and with a conscientious regard to the best interests of the profession. His now necessary retirement from the prominent position he took in Convocation will be a great loss to a body which can ill afford to lose such a hard-working, intelligent member. In 1872 he was made Q.C., a position which was then more a recognition of merit and less a *solatium* to political supporters than it has now become.

We congratulate the Government of the Dominion upon the appointment of Mr. Maclennan, and we venture to predict that the strength of the court will not suffer by his appointment. If this should be the result, the country may also be congratulated. Any Appellate Court which, as a whole, is not a strong court, and does not thus command the full confidence of the litigating public, cannot but be a misfortune to any country.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

The recent decision of the Court of Appeal in *Beaty* v. *Shaw*, 14 App. R. 600, establishes a very important qualification to the right of persons to recover for improvements made under a mistake of title. In that case the parties claiming the improvements had purchased the land in question under the erroneous supposition that a prior mortgage had been duly discharged. The plaintiff who claimed under this mortgage, established that notwithstanding the pretended discharge of it, it was still a subsisting security, but though making a declaration to this effect, the learned Chancellor, before whom the case was originally tried, coupled with it an order that the defendant purchasers were, as against the mortgagee, entitled to be allowed for the improvements made by them on the land, as having been made under a mistake of title. The claim of the mortgagee was thus virtually postponed to the lien for improvements in favour of the defendants. From this decision, however, the Court of Appeal dissented. Their Lordships were of opinion that the statute, R. S. O. c. 100, s. 30, does not apply to cases where a purchaser buys with a defective title.

Osler, J.A., says: "The governing words of the clause are 'under the belief that the land is his own;' the implication from them being that the case intended to be provided for by the Legislature is that of improvements made by a person, under a mistake of title, on land which turns out not to belong to him—not to be his own. Do they extend to such a case as the present, where the land is really the land of the person who has made the improvements, but is subject to a mortgage or prior charge of some kind, which from accident or neglect, he has failed to discover before he purchased it?" This question, he thinks, must be answered in the negative. The distinction which the Court of Appeal have thus drawn is rather a fine one. The existence of a prior encumbrance which a purchaser by mistake assumes to be discharged, may in many cases amount to the

virtual deprivation of the purchaser of the estate he has assumed to purchase. For if he pays his vendor the full value of the estate, and then discovers afterwards that there is an outstanding mortgage on the property for more than it is worth, although theoretically he has acquired some title to the property, viz., the equity of redemption, yet to all practical intents and purposes he has purchased nothing substantial, and his mistake of title is just as thorough and complete as though he had by mistake encroached upon the land of an adjoining proprietor. The law allowing a lien for improvements made by mistake of title to the extent to which the property is enhanced in value thereby, is based on eminently equitable principles, and it is to be hoped that it may not be "frittered away" by judicial decisions and fine-drawn distinctions. In *Fawcett* v. *Burwell*, 27 Gr. 445, a husband and wife had been in possession of land under the belief that the wife was entitled as heiress-at-law of her father, and the husband had expended a large sum of money in improvements. On a will subsequently turning up, the husband was allowed a lien for these improvements to the extent that they had enhanced the value of the property, and this enhanced value was allowed, although at a sale of the property under the decree it was not actually realized. In *McGregor* v. *McGregor*, 27 Gr. 470, an allowance was also made for improvements made under a mistake of title, under circumstances not very dissimilar to those in *Beaty* v. *Shaw*. The defendant McGregor, in 1863, had entered into possession of one hundred acres of land which belonged to his mother, under a promise that she would make him a conveyance of the property. The mother died in 1866, and the father, assuming that he was her heir, made a deed to the defendant. The father died in 1873, and the defect in the title being discovered in 1877, the defendant persuaded his brothers and sisters to give him a quit claim deed, which was subsequently set aside as having been obtained by fraud. The court, however, allowed the defendant a lien for improvements. In this case the defendant acquired some title, but not the full and absolute title he thought he was getting. By the deed from his father he acquired merely an estate for the life of his father as tenant by the curtesy instead of the fee simple. In *Skae* v. *Chapman*, 21 Gr. 534, the suit was brought by a mortgagor to redeem on the ground that the purchase of the equity of redemption by the mortgagee was invalid. The relief was refused, but in the course of his judgment, Spragge, C., at p. 549, refers to the Act authorizing the allowance for improvements made under mistake of title, and says, "Supposing the Act to apply, and probably it does;" and though he proceeds to show that compensation under the Act would be inadequate to meet the equities of the case, it is plain from the words quoted that his view was at variance with that arrived at by the Court of Appeal in *Beaty* v. *Shaw*. These cases do not appear to have been brought to the attention of the court in the latter case. Before concluding, we may notice *Till* v. *Till*, 15 Gr. 133. In that case the plaintiff and defendant, her husband, were married in 1865, the plaintiff being then the owner of the land in question in fee. The defendant was then carrying on business, which at his wife's request he sold out for $2,000 and expended the money on improving the lands in question, on which the plaintiff and her husband resided together until April, 1866, when they dis-

agreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The action was brought by the plaintiff to recover possession, and the defendant claimed to be allowed a lien for improvements, but as to this latter claim, Rose, J., who delivered the judgment of the court, said: "I am also unable to see how his claim for moneys expended upon the place can be allowed. They were not made under any mistake as to title, and must, I think, be held to have been made with the knowledge that the property would reap the benefit, whenever possession passed away from him."

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

The case of *Klœpfer* v. *Gardner*, which was recently decided by the Supreme Court (see *ante* p. 499), has set at rest an important point regarding the law relating to assignments for the benefit of creditors, viz., whether a creditor, who has unsuccessfully disputed the validity of the assignment, can afterwards claim the benefit of it. The Supreme Court has answered this question in the affirmative. In this case the creditors who had disputed the assignment had failed in the contest on the ground that they were estopped by reason of their having previously assented to it; and although they failed in upsetting the assignment on the ground that they had previously assented to it, yet, when they afterwards claimed a dividend under it, they were met with the answer, that they had forfeited the benefit of it by their unsuccessful attack upon its validity. In the court of first instance (10 O. R. 415), Wilson, C.J., and Armour, J., were of opinion that the mere bringing of the adverse proceedings of itself constituted a forfeiture of the benefits of the assignment, entirely irrespective of the grounds upon which those proceedings were determined; but O'Connor, J., dissented from this conclusion, on the ground that the adverse proceedings had not been disposed of on their merits, and, as he forcibly put it, the opposite conclusion was the result of "reasoning in a vicious circle with a vengeance." But, though the common sense of the late O'Connor, J., appears to have rebelled against what he conceived to be a "palpably absurd and unjust" conclusion, owing to the peculiar circumstances of the case, he seems to have coincided with the rest of the court as to the general principles which they laid down. The Court of Appeal, however, though adopting the reasoning of O'Connor in this particular case, were able also to support their judgment reversing the Queen's Bench Divisional Court, on grounds having a more general application.

Osler, J.A., who delivered the judgment of the Court of Appeal, very clearly and ably points out the plain distinction which existed between the case in hand, and the case of *Joseph* v. *Bostwick*, 7 Gr. 332, and the English authority on which that case was decided, viz., *Field* v. *Donoughmore*, 1 Dr. & W. 227. In *Klœpfer* v. *Gardner* the assignment was unconditional, whereas in the cases above referred to, and in the later cases of *Watson* v. *Knight*, 19 Beav. 369, and *In re Meredith*, *Meredith* v. *Facer*, 29 Chy. D. 745, to the same effect, the assignment was subject to a condition, which the debtor could lawfully impose, but with which the con-

testing creditors had failed to comply. As Osler, J.A., puts it, "all these cases proceeded upon the ground that the assignor was at liberty to make terms with his creditors, and to insist that those who intended to participate in the benefit of the trust created by him should do so on the terms he proposed, in other words, should become parties to an agreement whereby, in consideration of the composition offered, or of the giving up by the debtor of his property, they should release him from further demand. In such a transaction, therefore, creditors are put to their election either to accept the terms offered or stand on their original rights. . . . Now, however, that a debtor is no longer at liberty to exact terms from his creditors, or to require their assent to an assignment, or to prefer one class of creditors to another, there is nothing to put a creditor to his election."

This reasoning of the learned judge appears to be so manifestly sound, that it seems somewhat surprising that it should have been thought advisable to take the opinion of the Supreme Court on the point.

Reviews and Notices of Books.

VOLUME I. of Mr. Evans' treatise upon the Law of Principal and Agent in Contract and Tort has just been received from the Blackstone Publishing Co., of Philadelphia. It is a republication of the second English edition, with American notes. This series of text-books contains each year from 3,000 to 10,000 closely printed pages of matter, and all for the small sum of $15 per annum in advance.

The History of Canada. By WILLIAM KINGSFORD. Vol. II. Toronto: Rowsell & Hutcheson; London: Trübner & Co.

Mr. Kingsford continues his important and laborious work; and we have before us the second volume of his "History of Canada." The first contained the story of our country under French rule, from the earliest date down to 1682; the present volume continues it down to 1725, embracing the events occurring in the first administration of De Frontenac, those of De la Barre and Denonville; the second administration of De Frontenac, and those of De Callières and Vaudreuil,—in the reigns of Louis XIV. and Louis XV. of France, and of Charles II., James II., William and Mary, William III., Anne and George I. in England; a period fraught with most important events for Canada and the British Colonies in America, as well as for the mother-countries of both; and very interesting has he made the story he had to tell, and has told, in the 518 pages of the book, and an appendix containing some notes by which he elucidates the events he has related.

It is impossible, in the limited space allowed us, to give more than a very summary account of the scope of this important work, and to mention some few of the matters as to which we think it relates facts not generally known, or gives them with fuller details, or places them in a new light. It continues the account of the disruptions in the council and the occurrences which led to the recall of De Frontenac, and the changes following it until his re-appointment as governor, and then deals with those stormy times and events in Canada and the neighbouring colonies during his second administration, the effect of which still is, and will be long deeply felt. The ancient feud between the mother-countries was continued with increased intensity and bitterness between New France and New England and the other English settlements, and to the suffering and horrors attendant on war in the older countries were added the atrocities of barbarism and savagery; for both sides employed the Indian, and war was conducted after the Indian fashion—cruel, pitiless and unsparing—by attacks generally in the dead of night, when neither women nor children were spared, and when prisoners were given up by Christian leaders, at the demand of their savage allies, to Indian revenge and torture. Plans were laid by each side for the destruction of the other; by the English for the conquest of Canada, and by the French for that of New York, with intentions as to a mode of dealing with the conquered less lenient than that adopted towards Canadians when they became British subjects. Both plans came to naught.

A separate chapter is devoted to the history of Acadia during the period to which the volume relates, and the war carried on between it and New England, in which the Indian tribes of the Abenaquis and Canabas were employed on the French side, and many attacks made on New England villages, including Cocheco and Pemaquid, in which the spirit of Indian warfare was fully developed, and murder, arson and pillage reigned supreme, as they did in the massacres at Schenectady and Lachine, by the Iroquois as allies of the English. Mr. Kingsford has partly supplied a want we noticed in our account of his first volume, by a long note about the Iroquois, or Five Nations, and the several tribes which comprised the Mohawks, Oneidas, Onondagas, Cayugas and Senecas, and the tracts of country occupied by them. These tribes generally took part with the English. We think the note should have included the Algonquins, Abenaquis, and others who sided with the French.

The account given of the abortive attempt at the conquest of Quebec by Phips in 1690, is very interesting, and the scene between his party and De Frontenac, who was given, by the New England Major, one hour to consider the surrender of the Fort and its stores, is very picturesque, and by no means to the credit of the New Englanders. Phips was a brave man and an excellent sailor, and found his way safely up the St. Lawrence and out of it, but he had no skill as a soldier or a diplomatist, and his discomfiture and retreat show the impolicy of New York in sending him. There is also a graphic and detailed narrative of the unfortunate attempt to attack Quebec by the English fleet under Admiral Hovenden Walker in 1711, when by strange want of seamanship and precaution,

eight ships and nearly one thousand men were lost at the entrance of the St. Lawrence, which Phips had passed with ease and safety.

The account of the tragic death of De la Salle is touching and sad, and the summary of his adventures and discoveries very interesting, as is that of his character as a man equal to any amount of adventurous daring, but deficient in that power of winning and keeping respect and affection which ensures unhesitating obedience and faithful service, while he had a haughty manner which excited anger and dislike, under the influence of which he was murdered by two of his own followers. Mr. Kingsford states his belief as to the manner in which De la Salle's movements and conduct were probably influenced by the Spaniard Penatossa, and the expedition under his command.

A short extract from Charlevoix gives a pleasant description of life and society in Canada in 1720 as compared with that in the English settlements, very prettily translated, and by no means unfavourable to our countrymen of that date, and still less to our own countrywomen of the same period.

The account of the death and character of De Frontenac are graphic and fair, with "nothing extenuated nor aught set down in malice;" our author defends him against the charges of extravagant pretensions to power and the adoption of a policy for private ends, of violence of temper, and of exaction of personal consideration without true dignity; adding, that even if these faults be conceded, he still stands forth the most prominent of French Governors, and that the great stain on his name is the ruthless character of the massacres which he authorized; and of this he says: "His nature was genial and kindly, and the fault may be attributed to the school in which he was reared, and the maxim of war there recognized—that anything whatever that caused disaster to an enemy was permissible." Our historian calls him the "Second Founder of Canada," and winds up with Charlevoix's epitaph: "After all, New France owed to him all she was at the time of his death, and the people soon perceived the great void he had left behind him."

As an appendix, Mr. Kingsford has added a full and detailed account of the negotiations and events which led to the Treaty of Utrecht, which had so important effects upon the boundaries of Canada and the then English Colonies, and the terms of which he believes would have been much more favourable to England, if the conduct of the latter years of the war to which it put an end had been left to the Duke of Marlborough, of whom he speaks in terms of the highest admiration, as a general and a man of honour and unswerving fidelity to his country, and whom he holds to have been removed by the sovereign from his command under the influence of mean jealousy and intrigue, and defends from all the charges which had been brought against him, though he acknowledges his love of money to have been inordinate. The chapter is interesting as an essay on a moot point in English history, as well as in relation to Canada. The account is not flattering to the courts and sovereigns engaged—corruption was at least as flagrant then as now.

Mr. Kingsford has thus performed the promise he made, and given us a history of Canada during the time over which his two volumes extend, which

leaves little to be desired in extent of scope or fulness of detail, ably, and, as we believe, conscientiously written, with as much impartiality as human frailty admits of, after a faithful and indefatigable examination of trustworthy authorities. His style is simple and clear, preferring truth to rhetorical effect. He appears to have spared no pains to think rightly, and to say intelligently what he thinks. We can say of this volume, as of the first,—No student of Canadian history can afford to be without it. G. W. W.

Notes on Exchanges and Legal Scrap Book.

OWNER OF VICIOUS ANIMALS.—In *Warthen* v. *Love*, reported in the *American Law Register*, the Supreme Court of Vermont gave judgment in regard to the liability of the owner of a vicious dog, for damage done by it to the plaintiff. The court found that the defendant knew the vicious propensities of the animal, and had kept it chained in his barn, and that it broke away and injured the plaintiff by reason of being unlawfully provoked by the latter, who had no lawful occasion to go to the barn where the dog was. The court held that the owner, knowing the dog to be vicious, has the right to keep it if he exercises proper care and diligence to secure it, so that it will not injure anyone who does not unlawfully provoke or intermeddle with it.

INSANITY AS A DEFENCE.—In *State* v. *Mowry*, reported in the *American Law Register*, the Supreme Court of Kansas held the following to be a proper direction to the jury in a trial for murder in the first degree where the plea of insanity was set up: "If he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. . . . If this power of discrimination exists he will not be exempted from punishment because he may be a person of weak intellect, or one whose moral perceptions are blunted or illy developed, or because his mind may be depressed or distracted from brooding over misfortune or disappointment, or because he may be wrought up to the most intense mental excitement from sentiments of jealousy, anger, or revenge. . . . The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know

what he was doing, and the power to know that his act was wrong." The court seems to have no sympathy with the too frequently used plea of "irresistible impulse" or "moral insanity." It was also further held, that where a person is charged with having committed murder in the first degree whilst intoxicated, the jury may take his intoxication into consideration, not as an excuse, but in determining whether he was capable of that premeditation and intent to kill which are the necessary elements of the crime.

MEANING OF BILL OF LADING.—In *Brown* v. *Cunard Steamship Company*, the action arose out of the damage done to the plaintiff's goods on board the defendants' vessel, *en route* for Boston, the damage having arisen through the fault of the company. The bill of lading provided that, "in the event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs." It did not appear that the market value of the goods, as damaged, was less than their original invoice value, with the cost of importation added. The question was whether, in view of these facts, and of the language of the bill of lading, the company was exempt from liability. The defendants relied on *The Lydian Monarch*, 23 Fed. Rep. 298, and *Pearse* v. *Steamship Co.*, 24 Ind. 285, to establish that, under such a contract as the present, the liability of the ship-owner is limited to the excess of the invoice price of the goods, increased by the cost of importation, over the actual proceeds of the sale of the damaged goods; and that if the sale had realized the invoice price, after deducting costs of importation, sale, etc., there could be no cause of action. The Supreme Court of Massachusetts, however, decided that this was not the meaning of the contract, and that damages should be ascertained by finding the difference between the value of the goods as damaged, and as undamaged; and these damages should be paid by the defendant up to, but not exceeding, the invoice price of the goods. As the damage was less than the invoice price of the plaintiff's goods, judgment was for him for the whole amount claimed.

THE MARRIED WOMEN'S PROPERTY ACT, 1882.—Since we gave a summary of the principal decisions on the Married Women's Property Act, 1882, 85 L. T. 62, 81, several cases have been decided upon that statute, and the general tendency shown is still further to cut down its effect. When the Act first passed it was said that a married woman had become "a *femme sole* as to her property." This was soon seen to be too widely stated, and then the phrase usually employed was that the married woman "had become a *femme sole* with regard to her *separate* property" (*Thompson* v. *Krise*, 75 L. T. 235; *Re Queade's Trust*, 53 L. T. Rep. N. S. 77), so that with reference to property which was not "separate" her position was left untouched: see *Re Price, Stafford* v. *Price*, 52

L. T. Rep. N. S. 430; 28 Chy. D. 709. But now, according to Mr. Justice Kay, in *Re Jupp, Jupp* v. *Blackwell*, 59 L. T. Rep. N. S. 129, "the Act shows no intention of altering her legal position in respect of property, except altering her right to property as between herself and her husband." In support of this view, the learned judge referred to the remarks of Lord Justice Cotton in *Re March*, 51 L. T. Rep. N. S. 380, 382; 27 Chy. D. 166. In *Downe* v. *Fletcher and Wife*, 59 L. T. Rep. N. S. 181; 21 Q. B. D. 11, it was held by the Lord Chief Justice and Mr. Justice Mathew that, in an action against husband and wife to recover a debt contracted by the wife before marriage, where the marriage had taken place between the passing of the Married Women's Property Acts of 1870 and 1874, judgment could be entered against the wife, to be recovered out of separate estate, etc., without proof of existence of separate estate at the time of judgment. "The common law position of the wife," said Mr. Justice Mathew, "as regards contracts entered into before coverture has not been altered by the Legislature." In *Re Roper, Roper* v. *Doncaster*, 59 L. T. Rep. N. S. 202, Mr. Justice Kay held (p. 206) that sec. 1 (4) of the Act only applied to contracts made after the passing of the Act, and expressed an opinion that in cases falling within the Act, "to make property appointed by the will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her will makes the property appointed her separate property" (p. 208). But, in the judgment, his Lordship does not appear to refer to sec. 4 of the Act. Among the difficulties of the Act not the least is sec. 19, relating to marriage settlements, and excluding (subject to a proviso in favour of ante-nuptial creditors) marriage settlements from being affected by the Act. In *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264, which was a case on this section, Lord Esher said: "It would not be right to suppose that the Legislature, when they passed this Act, did not understand it, but unquestionably its construction by the court presents the most serious difficulties." No doubt the Act is not a simple one, but we cannot help thinking the difficulties have been partly occasioned by the restrictive interpretations placed upon it by the court. In the above case, however, the majority of the Court of Appeal decided (contrary to the judgment of Lord Esher) that when real property was vested in a trustee for a married woman for life for her separate use, and she carried on a trade separately from her husband, the Act was effectual to carry over the life estate to the trustee in bankruptcy. Of course there was no restraint on anticipation. The Lords Justices Lindley and Lopes held that the trustee was claiming under, and not in derogation of the settlement. Also in *Re Onslow's Settlement, Plowden* v. *Gayford*, 59 L. T. Rep. N. S. 308, the Act was held to have effect on property comprised in a settlement notwithstanding sec. 19. In *Otway* v. *Otway*, 59 L. T. Rep. N. S. 159, 13 P. D. 141, a doubt was raised as to whether the practice in the Divorce Court as to costs of an adulterous wife should be varied in consequence of the Married Women's Property Act. It will be seen that of the recent cases *Jupp* v. *Blackwell* gives the least, and *Re Armstrong* or *Re Onslow* the widest, effect to the Act. When will the Legislature undertake its revision?—*Law Times.*

RIGHT TO STOP A TRAIN TO MAKE AN ARREST.—The following account of a somewhat unusual case is from the *Albany Law Journal*:—An officer having a process issued in a civil action, by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer for the purpose of making the arrest. It is conceded by the plaintiff that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding; but the argument is that in civil proceedings the consequences are, or in conceivable cases might be, so detrimental to the public using the railroad, the court should hold on grounds of public policy that the right does not exist. The process was a legal one, commanding the officer to arrest Collins. The command in the process was the command, not of Hunt, but of the law. The officer did not act in making the arrest because Hunt commanded him, but because the law commanded him. Hunt, to be sure, had invoked the issue of the process, but the sheriff's justification and authority was the command of the process. Cases may easily be conceived in which, upon consideration of relative conveniences and inconveniences, the stopping of a train to serve a justice's writ upon its engineer would seem to be ridiculous. But on principle, would it be any more so if the train was stopped to serve a writ upon the engineer, claiming $10 in damages for an assault and battery, than stopping it to arrest him in a criminal proceeding seeking to impose a fine of $10 upon him for the same assault? It will hardly do to rest the question upon conjectural difficulties. If it is a question of public policy, it is so because its usual, normal and legitimate consequences are hurtful to the public. As a practical fact, there is little danger that officers will have occasion to stop a train for the service of process of any kind. Again, it is conceded that the officer might arrest the engineer at a station on the road. But this would delay the train just as long, and work precisely the same inconvenience to the public, as stopping it between stations. It is admitted that an officer might stop a stage coach to arrest the driver. This conceivably might delay the passengers on their way to a railroad station, so that they fail to reach a train that their business requires them to take. What is the difference in principle between an act which hinders the passenger on a public conveyance to the train and an act which hinders him while on the train? If the question is one of public policy, it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to its officer. It is the order of the State of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because, on grounds of public convenience or expediency, the court thinks it better to nullify the law. The plea alleges that the defendant's cause of action existed against the plaintiff as well as Collins. The suit for the injury to the heifer might have been maintained against the railroad company. Had it been so brought, and had the officer stopped the train to attach railroad property on board, the same mis-

chievous consequences to the public would have resulted as those now portrayed. Can it be claimed that process against a railroad company is not to be served as it may be against other defendants because it will work inconvenience to the public? Process served upon an individual may work incidental injury to others. If a physician is arrested, his patients may suffer. It is quite apparent that the argument that policy forbids the service of process as made in this case is unsound and illogical. The Legislature can establish any regulations in the premises that may be needed. Vt. Sup. Ct., Sept. 24, 1888. *St. Johnsbury & L. C. R. Co.* v. *Hunt.* Opinion by Powers, J.

TIME FROM WHICH SENTENCE OF IMPRISONMENT RUNS.—"I must exercise common sense in dealing with authorities," said Manisty, J., as reported in the *Law Times*, and certainly if *Henderson* v. *Preston* be regarded from that point of view, it must be allowed to be no less satisfactory than in point of law it is sound. The plaintiff was on the 24th August, 1887, sentenced at the petty sessions at Rochdale to a fine of 5s. and costs, for obstructing a public highway, or in default to be imprisoned for seven days. There not being sufficient distress to satisfy the fine and costs, the plaintiff was imprisoned in the police cell at Rochdale until the 25th August, when he was taken under a warrant to Strangeways prison, where he was detained in custody till the 1st September. Thereupon he took an action against the governor of Strangeways prison, claiming damages by reason of his being wrongfully, and without just or proper cause, imprisoned and kept and detained as a prisoner under sentence of imprisonment by the defendant in the said prison on the 31st August, 1887. The question was, whether the plaintiff's detention on the 31st August was justifiable, he having been, according to his contention, detained a day longer than the term of seven days for which he was sentenced by the magistrate, counting the time of imprisonment from the day of his arrest, the 24th August. It was on the 25th, however, that the defendant received him into his custody, and as his justification the defendant relied on the terms of the warrant of commitment. It ran as follows:—

"In the county of Lancaster—Petty Sessional Division of Middleton.—To each and all of the constables of the township of Spotland, in the county of Lancaster, and to all other constables and police officers in the said county, and to the governor of Her Majesty's prison at Strangeways, Manchester, Alexander Henderson (hereinafter called the defendant) was this 24th day of August, 1887, before the Court of Summary Jurisdiction, sitting at the Town Hall, Rochdale, in the said county, convicted for that he, on the 11th day of August, 1887, at the township of Spotland, in the said county, unlawfully and wilfully did obstruct the free passage of a certain public highway there situate, called Church Street, Whitworth, contrary to the statute in such case made, and it was adjudged that the defendant for his said offence should forfeit and pay the sum of 5s., and should also pay the sum of 14s. 6d. costs forthwith; and default having been

made in payment, and it appearing to this court that the defendant has not sufficient goods whereon to levy distress, it is ordered that the defendant be imprisoned in Her Majesty's prison aforesaid, and there kept for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid, and you the said constables are hereby commanded to take the defendant and convey him to the said prison and there deliver him to the governor thereof, together with this warrant; and you, the governor of the said prison, to receive the defendant into your custody and keep him for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid.

"Dated the 24th day of August, 1887.

"(Signed) J. I. HEAPE, J.P., for the county of Lancaster.

"Conveyed to prison on the 25th inst.

"(Signed) HENRY GREEN, P.C., 121 D.

"Endorsed, 25/8/87—4134.

"ALEXANDER HENDERSON. 7 days—31/8/87."

Now, contended the plaintiff's counsel, that the term of imprisonment dates from the day of arrest is established by *Migotti* v. *Colvill*, 4 C. P. D. 233, and *Re Bowdler*, 12 Q. B. 614; and it is the gaoler's duty to ascertain the time of arrest—failing to do which, he would detain the prisoner at his peril; citing *Re Fletcher*, 1 Dow. & L. 726; *Braham* v. *Joyce*, 4 Ex. 487; *R.* v. *Cutbush*, 36 L. J. M. C. 70. And indeed, but for those authorities (to which on our part we may add *Newman* v. *Lord Hardwick*, 8 A. & E. 124) the court would have entertained no doubt whatever that the defendant, who had detained the plaintiff for seven days and no more, was strictly justified by the plain and special language of the warrant. Suppose a constable should arrest a man at 11.55 p.m., and take ten minutes conveying him to prison, could it be contended that that should count as one day? "The officer bearing a warrant," observed Lord Denman in *Bowdler's* case, "may not be able to find the party named, and if it were held necessary that the warrant should contain a date from which the imprisonment is to run, it might as well be said expressly that a debtor shall be relieved from imprisonment if he is not to be found. The debtor is to be confined from the time when he is actually taken, and the time of taking is matter of evidence." And in reference to the decision in *Re Fletcher*, he observed, "With respect to the want of date on the warrant, my brother Patterson thought this a fatal objection in the case of *Re Fletcher*, but the subject has been much canvassed since, and he is now of a different opinion, and in that I agree." Indeed, we have always understood that it has long been settled law that in England, if the date be omitted, the warrant will not thereby become null and void, for the period of imprisonment will be reckoned from the time of the defendant being taken into custody, on the authority of *Bowdler's* case, *Ex parte Foulkes*, and *Braham* v. *Joyce*, overruling *Re Fletcher* in this respect. But *Henderson* v. *Preston* now places the law on a still more unquestionable footing. Said Manisty, J., "In the case of *Re*

Fletcher, 1 Dow. & L. 726, decided in 1843, the warrant was held bad because it had no date. In *Re Bowdler's* case, 12 Q. B. 612, decided in 1848, it was held that the time of imprisonment was to be calculated from the time the prisoner was taken into custody, but in that case the order for commitment was not in the same language as the warrant in the present case. In 1846, in the case of *Ex parte Foulkes*, 15 M. & W. 612, it was held that the time was to run from the time of lodgment in prison. In the case of *Braham* v. *Joyce*, 4 Ex. 487, decided in 1849, Parke, B., referred to *Re Bowdler*, and held that the period of imprisonment was to be calculated from the time the party was taken into custody. In that case the warrant had no date, and it strikes me as highly probable that the prisoner was taken to gaol when he was given into custody, but there is a great deal of ambiguity surrounding the case. In the case of *Migotti* v. *Colvill*, 40 L. T. Rep. N. S. 747; 4 C. P. D. 233, decided in 1879, the terms of imprisonment were cumulative, and I do not think that that case touches the present one. It is plain that under the terms of this warrant the plaintiff was to be imprisoned in Strangeways prison, and there kept seven days. I think, therefore, that judgment should be entered for the defendant." Stephen, J., concurred in this judgment, and pointed out that in *Re Bowdler* (and the same remark would apply to *Braham* v. *Joyce*) the order of commitment was less special than it was in the present case, and the attention of the court was not drawn to the distinction of time. But, it must also be borne in mind that the form of warrants given by our Petty Sessions Act (14 & 15 Vict. c. 93) expresses that each warrant of committal should be dated, else it would not be complete and would be a warrant issued in blank, which would be void under the statute, whereas there is no provision in the English statute against issuing the warrant in blank.—*Irish Law Times.*

WHAT IS AN INN?—The Supreme Court of Alabama construes the law against gaming strictly, as will appear from the judgment of Somerville, J., reported in the *Albany Law Journal.* It is well that no flimsy pretexts should stand in the way of enforcing such laws. The following is the judgment mentioned: A house at which transient as well as regular boarders are entertained is an inn, though not licensed, and a room therein, the only entrance to which is through the house, and which is let by the proprietress to a tenant who cooks and eats as well as sleeps there, is part of the inn within the meaning of the Code of Alabama, 1886, section 4052, which prohibits playing cards at a tavern, inn or public place. An inn is a house of entertainment for travellers, being synonymous in meaning with hotel or tavern. It was formerly defined to mean "a house where a traveller is furnished with everything he has occasion for while upon his way": *Thompson* v. *Lacy*, 3 Barn. & Ald. 283; *People* v. *Jones*, 54 Barb. 311. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a boarding-house, the guest of which is under an express contract,

at a certain rate, and for a specified time; the right of selecting the guest, or boarder, and fixing full terms, being the chief characteristic of the boarding-house as distinguished from an inn, except as to inns or hotels specially licensed under the statute, where general contracts with guests are expressly authorized: Code 1886, s. 1324 *et seq.*: *Willard* v. *Reinhardt*, 2 E. D. Smith, 148; *McDaniels* v. *Robinson*, 62 Am. Dec. 586, note. There is nothing inconsistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boarding-house and an inn. In respect to those who occupy rooms and are entertained under special contract it may be a boarding-house; and in respect to transient persons, who without a stipulated contract remain from day to day, it is an inn, tavern or hotel: *Cromwell* v. *Stephens*, 2 Daly, 15, 24; *Chamberlain* v. *Masterson*, 26 Ala. 371. The house occupied by Mrs. Schoolcraft was clearly both an inn and a boarding-house within the above definitions, partaking of a dual character in this particular. The playing was done in a room in the third story of this house, which had been rented from the proprietress by one Bibb by the year, and was occupied by him as a bedroom, in which he, having no family, prepared his meals, ate and slept. There was no connection between said room and inn or boarding-house, except that it was part of the building occupied by Mrs. Schoolcraft, and the entrance to the room was through that to the boarding-house. Was the room a part of the inn so as to be brought within the prohibition of the statute directed against playing cards at an inn? It has been uniformly held in this State, where a house is public, as a store, and a bedroom in the same building is under the control of the proprietor of the building, the room, though used for private purposes, is *prima facie* within the prohibition of the statute as to playing at a public house, "unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the mere convenience or accommodation of the owner, his employees or his customers, but it is occupied for some justifiable private purpose entirely disconnected from the business of the store, or the convenience of its customers": *Brown* v. *State*, 27 Ala. 47; *Huffman* v. *State*, 29 id. 40; *Arnold* v. *State*, id. 46. Yet when the playing is at a public house, inn, tavern, or any other of the places specially enumerated in the statute, no matter what secrecy may be observed in the playing, those who participate in the game will be held to be violators of the law, and subject to the penalty: *Windham* v. *State*, 26 Ala. 69; *Bythwood* v. *State*, 20 id. 47. So when a case is embraced in the words of a statute, and clearly falls within the mischief intended to be remedied by it, such case will be construed to come within the prohibition of the statute, however penal its terms may be: *Huffman* v. *State*, 29 Ala. 40. The room in question was in the same building occupied as an inn, and was rented by the occupant from the proprietress of the inn. It must, therefore, be construed to be appurtenant to it, so as to be a part of it within the prohibition of the statute: *Russell* v. *State*, 72 Ala. 222. There can be no difference between the case of a room in a hotel or inn engaged by the year, the month, the week or the day, so far as the question before us is concerned. In the Elizabethan inns travellers paid separately for

their apartments, and for each meal. In modern times there are hotels kept on what is known as the "European plan," where rooms may be engaged for a specified price and time, without meals or other accommodations. In fact, the modern guest often rents his room from the inn or hotel proprietor, and takes his meals at a restaurant; or obtains his meals there and his lodging elsewhere —there being at this day any amount of diversity as to the contracts and relations of the various patrons to the building and business of the proprietor. As observed in a recent case, and as we have substantially said above, "as the customs of society change, and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes": *Carpenter* v. *Taylor*, 1 Hilt. 195. Any other construction of the statute would easily enable persons to evade its provisions by the most flimsy devices. Ala. Sup. Ct., July 18, 1888. *Foster* v. *State*.

SOME NOTES OF CASES.—In *Sherman* v. *Sherman*, Iowa Supreme Court, September 7, 1888, it was held in an action on a note, the issue being whether plaintiff, the payee, had made defendant a gift of the note, and declarations made by plaintiff to defendant of an intent to make such gift having been admitted in evidence, that declarations by plaintiff, made to a third party shortly before the time of the alleged gift, expressing an intention to collect the note by legal means, there being no evidence of special design in making such statements, are not inadmissible as declarations made in plaintiff's interest, since they were made before any right had vested in defendant, and they tended to show that an intention to make the gift, if such existed, was changed before it was consummated. The court said: "The only object of the evidence introduced by the defendant tending to show that the plaintiff at some future time intended to give the note to the defendant was to strengthen and increase the probabilities that the gift was made at the time and as claimed by the defendant. Such evidence tended to show an intent to give only, and without more did not tend to establish the defence relied on. An unexecuted gift, it will be conceded, is not valid. In fact it cannot exist. But the evidence was material as showing an intent to give, and therefore had an important bearing on the question whether such intent had been consummated. The evidence proposed to be introduced had just an opposite tendency, and made it probable that while the plaintiff may have had the intent to make a gift, such intention had been changed, and that about two hours prior to the time the gift is claimed to have been made the plaintiff intended not to make a gift, but to insist on the payment of the note. Was the proposed evidence admissible? Counsel for the appellee insist it was not, because it was a declaration in favour of the plaintiff, and against the interest of the defendant. The declaration preceded the gift, and prior to the time any right had vested in the defendant, and we think the evidence was explanatory of the prior declarations of the plaintiff that he

intended to give the note to the defendant. The intent of a person to do or not to do any given thing can only be shown by his acts, declarations and conduct, and when declarations are introduced in evidence tending to show such intent, other and subsequent declarations tending to show a contrary intent, made prior to the consummation of the act, are admissible for the purpose of enabling the jury to determine what in fact the name of the person was, and thus making it probable or improbable that the act, whatever it may be in controversy, was consummated in accordance with the expressed intent of the party. This class of evidence constitutes an exception to the general rule, and may or may not be admissible, according to the circumstances of each particular case. It is difficult to establish a general rule applicable to all cases. The circumstances under which the declaration is made, its possible object, and whether made with an evident design and purpose, may affect its admissibility, and certainly will have an important bearing on the weight to be attached thereto. In the case at bar we discover no suspicious circumstances indicating an object or purpose on the part of the plaintiff except to express to a relative, with whom he was visiting, his then intention in relation to the note and what he intended to do with it, contradictory of and to any previous intent he may have had to give it to the defendant. Of course, if a controversy had arisen at the time the declaration to Mathews was made between these parties as to the proposed gift or intention to do so—if such intent amounted to a vested right—a different rule might prevail. The foregoing views, to a greater or less extent, are sustained by the following authorities: *Darby* v. *Rice*, 2 Nott & McC. 596; *Miller* v. *Eatman*, 11 Ala. 609; *Stone* v. *Stroud*, 6 Rich. Law, 306; *Whitney* v. *Wheeler*, 116 Mass. 490; *Whitwell* v. *Winslow*, 132 id. 307; *Joyce* v. *Hamilton*, (Ind.) 12 N. E. Rep. 294; *Shailer* v. *Bumstead*, 99 Mass. 112; *Barthelemy* v. *People*, 2 Hill. 248, note. Counsel for the defendant have cited many cases in support of this theory, but we think they are all distinguishable. In some the declaration was subsequent to the gift, and in none of them, we think, was the declaration sought to be introduced in evidence because contradictory to or as bearing on the question as to the existence of an unexecuted intent."—*Albany Law Journal.*

DIARY FOR NOVEMBER.

1. Thur....Co. Ct. non-jury sittings in York. All Saints' Day. Sir Matthew Hale born, 1609.
3. Sat.....O'Connor, J., Q.B D., died, 1887.
4. Sun.....*23rd Sunday after Trinity.*
6. Tues ...First intermediate examination.
8. Thur....Second intermediate examination.
9. Fri.....Prince of Wales born, 1841.
11. Sun.....*24th Sunday after Trinity.*
12. Mon....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
13. Tues....Ct. of Appeal sits. Solicitors' examination.
14. Wed....Barristers' examination. Falconbridge, J., Q.B.D., appointed 1887.
15. Thur....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
17. Sat.....Lord Erskine died, 1823, æt. 73.
18. Sun.....*25th Sunday after Trinity.*
19. Mon....L. S. Michaelmas Term begins. H.C.J. sittings begin. Armour, J., gaz. C.J., Q.B.D., 1887. Galt, J., gaz. C.J., C.P.D., 1887.
21. Wed....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
25. Sun.....*26th Sunday after Trinity.*
30. Moss, J. A., appointed C. J. of Appeal, 1877. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed 1887.

Reports.

ONTARIO.

COUNTY OF ONTARIO.

[Reported for the CANADA LAW JOURNAL.]

BROWN *v.* BROWN.

Married Woman's Maintenance for Desertion Act — Evidence of desertion — Rule of decision.

Order of magistrates set aside, where the evidence does not show a wilful desertion, ability to support, in whole or in part, and wilful refusal or neglect to do so.

[WHITBY, October, 1888.

The facts of this case appear in the judgment.

DARTNELL, J.J.—I do not think that the provisions of the above Act were either meant or intended to give the magistrates any larger powers than a court would have in decreeing alimony. The evidence shows that the alleged desertion could be explained as arising from an accident and illness, and that when the husband did return he was received by his wife in such a way as to justify his leaving his home again and going to live with his daughter. The wife says she never asked him to return, and the husband swears that she told him to go, and that if he stayed she would not cook his meals for him; and she carried out this threat, so that he had to board at a neighbour's. The house and eight acres of land belong to the husband, and the wife is in occupation of it without molestation. The pair are poor and well advanced in years, and their joint exertions afford them but a scanty living. There appear to be faults on both sides, and it is impossible to say who is most to blame. I am satisfied from the authorities that no court would decree alimony upon such evidence as here adduced, and it seems to me this new court has no greater power.

The question of what amounts to desertion is one of great difficulty. The statute, as taking away in certain cases an ancient prerogative of Equity Courts, must be considered strictly.

The husband, from the evidence, is almost a pauper, and from age and infirmity is not capable of earning a living by manual labour. But for his daughter he would be homeless. The order made for payment of $5 a week is excessive, or impossible of fulfilment.

Under these circumstances, and for the reasons above stated, I allow the appeal.

The Act provides that the husband shall pay the costs, and the procedure of the Masters' and Servants' Act (R. S. O. c. 139), being made applicable to this Act, I suppose they are collectable in the manner therein provided.

R. McGee, for the appellant.

N. F. Paterson, Q.C., for the respondent.

MUNICIPAL LAW.

VOTERS' LISTS ACT.

Voters' Lists—Non-compliance with directions as to advertising—"Next" municipality.

The Clerk of Brock certified to the County Judge the due posting and distribution of the Voters' Lists for 1888, and the insertion of the advertisement of such in the *North Ontario Observer*, a newspaper published in the "village of Port Perry."

Held, under the circumstances detailed in the judgment, that the statute had not been complied with as to advertising.

[WHITBY, October 15th, 1888.

Sec. 9 of R. S. O. c. 8 (the Voters List Act), provides that in case no newspaper be published within the municipality for which the lists are prepared, notice of the date of

the first posting up in the clerk's office, and of the distribution thereof, "shall be inserted in some newspaper published in the municipality; and in case no newspaper is published in the municipality, then in some newspaper published in the municipality next thereto, or in the county town." There is no newspaper published in Brock, but there is one at the incorporated village of Cannington, which is wholly surrounded by the territory of Brock. The incorporated village of Port Perry is in the same way surrounded by the territory of Reach, which is *next* to the south to Brock.

DARTNELL, J.J.—I am of opinion that the requirements of the statute have not been complied with. Several miles of the territory of Reach intervene between Brock and Port Perry; and, in fact, it would not be possible to travel from Brock to Port Perry without passing through other municipalities. In no sense is Port Perry *next* Brock. The advertisement should have been published in the Cannington newspaper, or in one published in Whitby, the county town.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

COYNE *v.* BRODDY.

Trustee and cestui que trust—Statute of Limitations.

In 1877, B. having become aware that plaintiff held some promissory notes of one F., for whom B. was effecting a loan, suggested that plaintiff should hand over the notes to him, as money was going through his hands for F., and that he would collect them and save the amount for herself and children. Plaintiff having acted on such suggestion, and the money having been received by B. in that year was retained by him until 1886, when he became insolvent and made an assignment under the Act to trustees, who, in distributing the assets, refused to recognize the plaintiff's claim, and pleaded the Statute of Limitations to an action brought to enforce payment.

Held, reversing the judgment of the Chancery Division (13 O. R. 73), that the transaction was such as created the relation of trustee and *cestui que trust* between the plaintiff and B., and that the right to recover from B.'s estate was not barred by the lapse of time.

MCPHERSON *v.* WILSON.

Parol evidence—Fraud—Misrepresentation—Written agreement.

In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant, who swore at the trial that he never agreed to give such notes, and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made, and that when the writing was read over by the agent no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts, but the judge refused to permit such evidence to be given, as fraud was not set up as a defence; and also refused to allow an amendment setting up such defence, by reason of which judgment was entered against defendant for $200, which the judge in term refused to set aside.

On appeal, this court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, were of opinion it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial, allowed the appeal with costs, and ordered a new trial without costs.

In re MACDOUGALL.

Solicitor, certificate to practise as—Uncertificated solicitor allowing his name to be used—R. S. O. c. 140.

Held, affirming the judgment of the Q. B. D. (BURTON, J.A., dissenting) that a duly admitted and enrolled solicitor, but who does not take out his annual certificate as such, cannot allow his name to be used in legal proceedings as partner by a firm of practising solicitors, even though he does not derive any emolument therefrom, without rendering himself liable to the fines and penalties imposed by R. S. O. c. 140.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [Sept. 7.

TRICE *v.* ROBINSON.

Personal representative—Letters of administration issued after action brought—R. S. O. (1887), *c.* 194, *s.* 122.

In an action (which had to be brought within three months) under R. S. O. c. 194, s. 122, by the administratrix of the deceased, it appeared that the accident from which the cause of action arose happened on June 1st, the writ of summoms was issued August 31st, but the letters of administration to the plaintiff were not issued until September 3rd.

Held, that by the old rule in Chancery proceedings it was sufficient for the administrator to obtain letters of administration before the case was heard, as they, when obtained, related back to the death, and that now by R. S. O. (1887), c. 44. s. 53, s.s. 12, the equitable doctrine as opposed to that at law must prevail, and that the plaintiff's letters of administration were issued in time.

T. H. A. Begue, for the appeal.

Moss, Q.C., contra.

[Oct. 24.

In re SOLICITOR.

Solicitor and client—Costs, taxation of—Disallowance of costs of unnecessary proceedings—Interest—Appeal—Time.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed, under Con. Rule 1215, unless it is shown that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket and without regard to the interests of his client.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client.

The time for appealing from a taxation of costs begins to run from the date of certificate of taxation, not from the date of each ruling in the cause of taxation.

Aylesworth, for the solicitor.

W. H. P. Clement, for the client.

Armour, C.J.] [Nov. 1.

PRICE *v.* GUINANE.

Landlord and tenant—Overholding Tenants' Act—Powers of County Judge—"Colour of right"—Writ of possession—Stay of proceedings.

The expression "colour of right" in the Overholding Tenants' Act, R. S. O. c. 144, means such semblance or appearance of right as shows that the right is really in dispute.

The Act confers no authority upon the County Judge to try the question of the tenant's right or title; as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the judge is bound to dismiss the case.

Gilbert v. *Doyle*, 24 C. P. 60, and *Woodbury* v. *Marshall*, 19 U. C. R. 597, not followed.

Upon the proceedings before the County Judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Act.

Chancery Division.

Boyd, C.] [Oct. 16.

Re HARVEY *v.* PARKDALE.

Damages, measure of—Strip of land reserved by owner in laying out street—Expropriation by municipality arbitration—Notes of evidence—Appointment of arbitrator.

Two owners of adjoining blocks of land laid out streets through the centre thereof, to within one foot of the boundary line between their respective blocks, each reserving one foot to himself, thus forming an obstruction to the street of two feet of land, and laid out and

sold off their respective blocks in building lots. Subsequently the corporation of the town in which the land was situate passed a by-law to expropriate these two feet as a local improvement, to be paid for by the owners of the property benefited by the opening through of the street, and an arbitration was held under said by-law with one of the owners, and an award made fixing the value of his one foot at one dollar. On a motion to set aside this award. It was

Held, that it is only damages necessarily resulting from the exercise of the power of expropriation which can be taken into account under R. S. O. (1887), c. 184. s. 483.

Held, also, that the true rule is that when Parliament gives compulsory powers and provides that compensation shall be made to the person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. at p. 42, quoted with approval.

Held, also, following *Re Muskoka* v. *Gravenhurst*, 6 O. R. p. 357, that the objection that notes of evidence were not taken by the arbitrators and filed as directed by sec. 401 of the Act, should not be held irremediable.

Held, also, following *Re Eldon* v. *Ferguson*, 6 U. C. L. J. 207, that the award should not be interfered with on the ground that the arbitrator was not appointed under seal, as that objection, if a valid one, could be taken by the appellants on any proceeding to enforce the award if so advised; *Re Gifford* v. *Bury Town Council*, 20 Q. B. D. 368, and *Re Smith* v. *Plympton*, 12 O. R. at p. 31, referred to and distinguished.

Maclennan, Q.C., for the appeal.

Jas. H. Macdonald, Q.C., contra.

Robertson, J.] [Oct. 19.

NIHAN *v.* ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways—Notice to expropriate—Notice of desistment—Bond—Ultra vires—Injunction.

On June 13th, 1887, the defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed a bond in a penal sum of $1800, which was duly allowed by the County Judge, and possession taken by the plaintiffs. Subsequently, the Act 51 Vict. c. 78 D. was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, but ratifying all acts already done in that regard. On August 22nd, 1888, the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only.

Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Acts, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the land.

Where a railway company gave notice of their intention to expropriate certain lands, and the evidence showed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow,

Held, that they should be enjoined from proceeding with the expropriation.

S. H. Blake, Q.C., and *Collier*, for the plaintiff.

Aylesworth and *Ingersoll*, for the defendants.

Boyd, C.] [Oct. 22.

GOODERHAM *v.* TRADERS' BANK.

Mortgage—Redemption of previous mortgage—Assignment in place of a discharge or reconveyance—Form of assignment—R. S. O. 1887, c. 102, s. 2.

The Traders' Bank held a mortgage on certain lands of W. to secure his current account, which was also secured by commercial paper, much of which paper consisted of notes

made by other customers of the bank for the accommodation of W.

G. had a mortgage on the same lands subsequent to the T. Bank, and made a tender to the T. Bank (who were threatening to sell the land under the power of sale in their mortgage) of what they claimed as due to them, but also insisted on the execution at once by them of a simple assignment of the mortgage debt and mortgaged lands to G., with a covenant that the amount claimed was really due. The T. Bank refused to accept the tender as so made, and G. now moved for an interim injunction to restrain the bank from dealing with their security until the trial of this action, in which G. sought an account of what was due the T. Bank, and on payment, an assignment to him.

Held, that the motion must be dismissed with costs, which might be added to the claim of the T. Bank.

Under R. S. O. (1887) c. 102, s. 2, G. was entitled to demand an assignment to himself if he wished, but he could not insist on the execution of the assignment tendered, as the T. Bank was entitled to have the assignment show the precise character in which G. was paying the money, and also the notes in respect to which the bank were claiming, and who were accommodation makers thereof, and the bank was not bound to give a covenant as to what was due. G., however, was entitled to an account, and re-payment of any excess.

T. P. Galt, for the plaintiff.

Lash, Q.C., and *Lefroy*, for the defendants.

Practice.

C. P. Div'l Court.] [Sept. 11.

BALL *v.* CATHCART.

Ejectment—Res judicata—Judgment by default of appearance — Divisional Court, powers of.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.

A Divisional Court has no power to hear an appeal direct from the Master in Chambers, or a substantive motion to set aside a judgment by default of appearance.

Masten, for the plaintiff.

Aylesworth, for the defendant.

Armour, C.J.] [Oct. 3.

ROWLAND *v.* BURWELL.

Reference, scope of—Judgment—Pleadings—Con. Rules 56, 57.

A judgment directed that the Master should take the usual accounts for redemption or foreclosure of mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the Master should take into account a certain sale by the plaintiff, as mortgagee to a person who, it appeared, had not paid his purchase-money. There was no specific mention of this sale in the pleadings or judgment.

Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the Master. *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall* v. *Lindsay Paper Mill Co.*, 20 U. C. L. J. 133; *Wiley* v. *Ledyard*, ib. 142, referred to.

E. R. Cameron, for the plaintiff.

R. M. Meredith, for the defendant.

Armour, C.J.] [Oct. 26.

SCOTT *v.* DALY.

Costs—Party and party—Status of solicitor.

The defendant in this action was represented by a firm, purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him.

Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given. *Reeder* v. *Bloom*, 3 Bing. 9; —— v. *Sexton*, 1 Dowl. 180, followed.

D. W. Saunders, for the plaintiff.

Delamere, for the defendant.

Mr. Dalton.] [Oct. 26.

MACARA *v.* SNOW.

Counter-claim—Close of pleadings—Notice of trial.

A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And, therefore, where the plaintiff took issue on the defence, not mentioning the counter-claim,

Held, that the pleadings were closed, and a notice of trial served thereafter was regular.

Douglas Armour, for the plaintiff.

Masten, for the defendant.

Mr. Dalton.] [Oct. 31.

TENNANT *v.* MANHARD.

Partnership—Judgment against firm—Execution against alleged partner—Con. Rules 756, 876.

The plaintiffs recovered judgment against the defendants, a partnership firm, by default of appearance after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D., as a member of the firm. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the Master in Chambers that he was a general partner, and he made the order asked for. The Master

Held, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con. Rule 876.

Held, also, that Con. Rule 756 was applicable at this stage of the cause, *i.e.*, after judgment obtained without pleadings.

Shepley, for the plaintiffs.

E. T. English, for one Doddridge.

Mr. Dalton.] [Nov. 1.
Galt, C. J.] [Nov. 10.

TORONTO AND HAMILTON NAVIGATION CO. *v.* SILCOX.

Jury notice—Action to rescind contract—R. S. O. c. 44 *s.* 77—*Parties—Joint contractors.*

The action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract, and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof.

Held, that this was an action over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under s. 77 of the Judicature Act, R. S. O. c. 44.

The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own, he had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it.

Held, following *Kendal* v. *Hamilton*, 4 App. Cas. at p. 513 *et seq.*, that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor.

Quære, whether W. would have a right to be brought in as a defendant on his own motion.

Shepley, for the plaintiffs.

Hoyles, for the defendant.

Armour, C.J.] [Nov. 2.

WORMAN *v.* BRADY.

Costs—Jurisdiction of County Court—Title to land—Pleading.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the plaintiff terminated the tenancy, etc.

Held, that the title was put in issue by such denial, and as a County Court would, therefore, have no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only $75.

Held, also, that the question whether the title was in issue must be determined according to the pleadings and not according to what took place on the trial or reference.

D. C. Ross, for the plaintiff.

E. T. English, for the defendant.

Armour, C.J.] [Nov. 13.

KEAN *v.* EDWARDS.

Award—Appeal from—Time—Trinity Term.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied.

And where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was

Held, too late, and the appeal dismissed.

Lash, Q.C., and *Kean*, for the plaintiff.

Pepler, for the defendant.

Court of Appeal.] [Nov. 13.

In re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition—Amendment—Con. Rule 444*—Appeal—Waiver.*

The order of the Chancery Divisional Court, 12 P. R. 435, affirmed on appeal.

Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order.

Semble, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, Ontario Judicature Act (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular.

S. H. Blake, Q.C., and *H. Cassels*, for the infants' mother.

J. Maclennan, Q.C., *and J. K. Kerr*, Q.C., for the father.

Court of Appeal.] [Nov. 13.

BETTS *v.* GRAND TRUNK RAILWAY CO.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

The decision of the Common Pleas Divisional Court, 12 P. R. 86, affirmed substantially on the same grounds.

Lyell v. *Kennedy*, 27 Ch. D. 1., and *Kyshe* v. *Holt*, W. N. 1888, p. 128, referred to in addition to the cases cited in the judgment appealed from.

Osler, Q.C., for the appellants.

Robinson, Q.C., and *Shepley*, for the respondent.

Law Students' Department.

The following papers were set at the Law Society Examination before Trinity Term, 1888.

CERTIFICATE OF FITNESS.

REAL PROPERTY AND WILLS.

1. A bequest is made of "$100 each to the three children of A. B." At the time of the testator's death, A. B has five children. How is the bequest to be construed?

2. How do you construe a devise "to A or his heirs?"

3. A owns three lots of land, which he specifically devises in three parcels to three persons. He has not enough personalty to pay his debts, but he bequeaths it to his executors for payment of his debts? How will the estate be administered, having regard to the Devolution of Estates Act?

4. An execution is in the sheriff's hands against the lands of A. He buys land from B, pays part of the purchase-money, takes a conveyance and gives a mortgage on the land for the balance at the same time. Does the execution take priority over the mortgage? If so, explain how the transaction can be carried out without paying the execution, without giving it priority, and without the intervention of trustees?

5. State the chief characteristics of the present registry law.

6. When is it necessary for a husband to join in the conveyance of his wife's property, and when not?

7. A purchaser agrees to pay his purchase-money by instalments stretching over ten years. There is a mortgage on the land which matures in five years. Nothing is said in the agreement about title. What are the purchaser's rights as to title and removal of incumbrance, having regard to his liability to pay the purchase-money?

8. What is meant by a doubtful title?

9. When are covenants for title implied in a conveyance?

10. In what securities may a trustee invest the trust funds when there is no direction in the trust deed?

SMITH ON CONTRACTS AND BENJAMIN ON SALES.

1. In consideration of previous seduction, a man makes a promise to pay a sum of money to a woman. Is the promise binding, and would it make any difference if a bond were given? Reasons.

2. A for good and valuable consideration makes a *verbal* promise to B that he will pay a debt of $100, which B owes to C. Is the promise binding? Why?

3. If there is a discrepancy between the amount mentioned in the body of a promissory note, and the figures in the margin, will parol evidence be admitted to prove what amount was intended? Why?

4. If a contract to marry is made between a man of full age, and a woman under age, can an action be maintained by either of them for a breach of such contract? Reasons.

5. Up to what time may an offer *by letter* to sell goods be retracted?

6. May an *unsigned* writing ever be used in evidence to satisfy the Statute of Frauds? If so, when, and how?

7. What different remedies may be had by a vendee for breach of a warranty of the quality of the goods sold?

8. When a vendor exercises the right of *stoppage in transitu*, what effect has such exercise upon the title to the goods?

9. What is the difference between a *condition precedent* and a *warranty*, and how may the former be changed into the latter by the conduct of the vendee?

10. What effect will be produced upon the validity of a tender; (*a*) if it be accompanied by a protest that nothing is due; (*b*) if it be made upon condition that a receipt be given for the amount tendered?

EQUITY.

1. A client brings you a binding agreement with another party for the sale to him of property in Manitoba, which that party refuses to carry out. How would you advise him to act? Explain.

2. A mortgagee of certain lands on which the mortgage is in arrears, proceeds to serve a notice of sale on the mortgagor, and at the same time issues a writ on the covenant for the money. The mortgagor comes to you for advice. How would you advise him? Give reasons for your answer.

3. A dies in Toronto possessed of personal property there and in New York; letters of administration are taken out in Toronto, also in New York; discuss the question as to which law will prevail in administering the estate in New York.

4. What was the law as to the liability of a purchaser seeing to the application of the purchase-money? What, if any, Provincial legislation has there been bearing on the same?

5. A enters into a binding contract with B for the purchase of Blackacre, on which is situate a dwelling-house, which B describes as being surrounded with a fine park well wooded. A, discovering that this is not the case, refuses to carry out the contract. B sues for specific performance. Who should succeed, and why?

6. What are the provisions of 27 Eliz. c. 4? Is there any Provincial legislation dealing with the same, if so, what?

7. What was a Bill for Discovery? Is such a remedy necessary now? Explain.

8. Is there any statutory provision as to claims against an estate of which the executor has given the creditor notice of rejection, if so, what?

9. A, who is a public reciter, agrees with B to recite for the season at a place to be named by B. He afterwards refuses to do so. What, if any, remedy has B?

10. How, if in any way, is consolidation of securities affected by Provincial legislation?

MERCANTILE LAW—PRACTICE—STATUTES.

1. A and B are in partnership. They have a difficulty with C, which B, on belalf of the firm and C, refer to the arbitration of D. How far is the firm bound by the submission? Why?

2. A is a broker in Toronto. B, an English customer, endorses to him a bill of lading of goods. A is in debt to C for moneys advanced by C to A, and to secure such debt, A transfers to C the bill of lading; C obtains the goods, sells them, and proposes to deduct his claim from the proceeds as against B. Can he do so? Why?

3. A husband being in embarrassed circumstances wishes to insure his life for the benefit of his family. He obtains a policy of insurance made payable to his wife and children. His creditors claim the amount of the policy. What rights have they?

4. On a contract of affreightment, what are the duties of the merchant?

5. A is a grocer, and wishes to obtain credit from B. C writes a letter to B agreeing that if B will give A credit in the purchase of grocery goods he, C, will be liable to the amount of $1,000. A obtains $500 worth of the goods from B, when C dies. B then continues furnishing the goods to the amount of another $500, and proposes to claim on C's estate for the whole $1,000. Can he do so? Why?

6. Explain what is meant by *general lien.* What statutory provision have we protecting mechanics for work done on chattels?

7. What is the procedure for determining a claim under the Creditor's Relief Act where such claim is disputed either by the debtor himself, or by another creditor?

8. What provision is made for security for costs in actions for libel?

9. A has a claim against B on a store account. At the time the claim arises B is in the United States, and continues to live there for six years. On his return to Canada A sues him. B sets up the Statute of Limitations. Can he protect himself thereby? Why?

10. Under what circumstances will a transfer made by a debtor to a creditor of the property of such debtor be good, the debtor being at the time in insolvent circumstances?

CALL.

REAL PROPERTY AND WILLS.

1. What is the law as to the validity or invalidity of a voluntary conveyance against a subsequent conveyance for value?

2. When is an abstract said to be perfect?

3. What are the respective offices of *particulars* and *conditions* of sale?

4. An uninsured house is burned down after a judicial sale, but before the report on sale is made. Who bears the loss? Why?

5. Can a mortgagee buy the mortgaged land (1) at a sale under the power in his mortgage; (2) at a sale under an execution against the mortgagor's lands? What is the result in each case, supposing that he does buy?

6. A, domiciled in Canada, dies in France, but first makes a will. Should it be executed according to French law or Canadian law? Why?

7. Draft a clause devising land to A for life, and after his death, to his children as tenants in common, so that the rule in *Shelley's Case* will not apply.

8. Land is conveyed to A for life, remainder in fee to C B, a married woman, by deed dated 2nd January, 1870. On 1st August, 1888, she contracts to sell her estate, the tenant for life still living, but her husband refuses to join in the conveyance. Can she make a good title? Why?

9. An auctioneer verbally gives notice of an alteration in a condition of sale, and then sells The purchaser signs the contract without having the alteration made in writing. What are his rights and liabilities (1) in an action of specific performance by him; (2) in an action against him?

10. Is there any difference between proof of title in quieting a title, and that required of a vendor? Explain fully.

HARRIS ON CRIMINAL LAW—BROOM'S COMMON LAW, BOOKS 3 AND 4—BLACKSTONE, VOL. I.

1. Under what circumstances may one man become liable for the tort of another by *ratification?*

2. Give an example of a wrongful act for which the wrongdoer may be proceeded

against in an action *ex contractu*, in an action *ex delicto*, or in a *criminal prosecution.*

3. Give an instance of a wrongful act which renders the wrongdoer liable to two separate actions by two different plaintiffs for injury to the same person or property.

4. Mention any exceptions to the rule that a man can only be tried once for the same crime.

5. Distinguish *burglary* from *housebreaking.*

6. On a trial for murder, on whom does the burden of proof lie, as to the question of malice aforethought? Why?

7. Distinguish *riot* from *unlawful assembly.*

8. What is the present doctrine of our criminal law as to *insanity* forming a defence to an indictment for murder?

9. Under what circumstances may a *dying declaration* not made upon oath be received in evidence on a criminal trial?

10. What is the general rule as to the way in which *penal* statutes, and statutes *against fraud* should be construed? Reasons.

EQUITY.

1. State the general rule as to the liabilities of trustees for the acts of their co-trustees. What, if any, difference is there in such liability in cases of private trusts and those of a public nature?

2. In cases of election what do you understand by the statement, "The intention to dispose must in all cases appear in the will"?

3. A sells a building lot to B, exhibiting to him at the time a plan made by him showing a portion of his land as a public park. Some time after A proceeds to build on the land shown on the plan as a park; has B any remedy, if so, what?

4. What, if any, distinction is there in the relief granted by equity in an action for the delivery up of void and voidable instruments respectively?

5. A, who is lessee from B of a certain farm, contracts verbally with him, B, for the purchase of it. B refuses to carry out the contract, and A brings an action for specific performance, setting up possession as sufficient to take the contract out of the statute. State who should succeed, giving reasons.

6. What, if any, Provincial legislation is there providing for improvements made under mistake of title?

7. Under what circumstances will a Court of Equity allow a separate debt to be set off against a joint debt?

8. An infant representing himself to be of full age conveys a property to B, and seeks, afterwards to have contracts set aside on account of his nonage. Can he succeed? Explain general law.

9. Distinguish between a mortgage and a pledge.

10. What do you understand by the term subrogation?

CONTRACTS—EVIDENCE—STATUTES.

1. "A proposal when accepted becomes a contract." How far may a proposal, before acceptance, become a contract in English law?

2. What exception is there to the rule that the revocation of a proposal takes effect only when it is communicated to the other party?

3. How far is a contract made by a man who is drunk, valid?

4. "No third person can become entitled by the contract itself to demand the performance of any duty under the contract." What exceptions are there to this rule?

5. When conditions are prescribed by statute for the conduct of any particular business, and such conditions are not observed, when are agreements made in course of such business void or valid?

6. How far, and under what safeguards, is the evidence of children admissible?

7. What are the presumptions which the law makes against misconduct?

8. What are the exceptions to the rule excluding second-hand evidence? Explain the principle on which each exception is allowed.

9. In what cases may agreements be made with residents out of Canada for service in Ontario?

10. In a proceeding before a County Court a counter-claim of the defendant involves matter beyond the jurisdiction of the court. How far does this affect the competence of the court to deal with the case?

LORD NORBURY, while on circuit, being attacked by illness, sent to the Solicitor-General to ask for the loan of a pair of slippers. "Take them," said the Solicitor-General to the servant, "with my respects, as I expect soon to have his lordship's shoes."

Obituary.

The late Hon. James Patton, Q.C., LL.B., whose sudden death on the 12th ult. was so painful a surprise to his many friends and to the people of this Province generally, was one of a generation of Canadian public men whose ranks are being rapidly thinned.

Mr. Patton was born in Prescott, Ont., on June 10th, 1824. He was the fourth and youngest son of Major Patton of Her Majesty's 45th Regiment, and formerly of St. Andrew's, Fifeshire, and received his education at Upper Canada College. In 1840 he began the study of the law in the office of the Hon. John Hillyard Cameron, Q.C., and in 1845 he was enrolled as a matriculant in King's College, now the University of Toronto, and in the same year he was admitted as an attorney and called to the Bar. In 1847 he took the degree of LL.B., and in 1862 was made a Q.C.

Mr. Patton commenced the practice of his profession at Barrie, in the county of Simcoe, and he soon acquired a large practice. He devoted himself to his professional life with the same energy and thoroughness that characterized him in the various spheres of usefulness which he subsequently filled. An ardent politician of the old Loyalist type, he always took an active interest in public matters, and was known in the agitation which took place over the Rebellion Losses Bill. In 1856, when the Legislative Council was made elective, he was chosen as the Conservative candidate for the Northern Division, comprising the counties of Bruce, Grey and North Simcoe, and was elected by a large majority. In 1862 he became a member of the Cartier-Macdonald Ministry, taking the portfolio of Solicitor-General for Upper Canada. On the fall of that Government he retired from parliamentary life, and resumed the practice of his profession in Toronto, taking as his partner Mr. Featherston Osler, now one of the Judges of the Court of Appeal. Subsequently he practised in Kingston, and again in Toronto in partnership with Hon. Sir John Macdonald. On giving up the legal profession he became Manager of the British Canadian Loan Company, and was subsequently appointed Collector of Customs in Toronto. He found in this position much to be done, and he applied himself most zealously to the discharge of the duties of the office.

Mr. Patton was a man of literary tastes, and his active brain and untiring energy found time to devote to other matters besides his professional or business duties. Amongst his many fields of usefulness not the least was the part he took in connection with University Education. He was also a journalist. Whilst in Barrie he started the *Barrie Herald*, the organ of the Conservative party in the North country, and for several years he was the editor of that paper. In 1855, inspired by Judge (now Senator) Gowan, and assisted by Hewitt Bernard (afterwards Deputy Minister of Justice) he founded this journal, which first appeared as the *Upper Canada Law Journal*. To him, therefore, belongs the credit of being the pioneer in legal journalism in this Dominion.

A man of unsullied honour, of high intelligence, of great mental and physical energy, the public has suffered a great loss in the death of the Honourable James Patton. His funeral was largely attended Amongst the pall bearers, named by him long before his sudden death, were two of his old law students in Barrie, Hon. Mr. Justice Osler and Mr. Henry O'Brien, the present editor of this journal.

Appointments to Office.

Judge of the Supreme Court of Canada.

Hon. C. S. Patterson, one of the judges of the Court of Appeal for Ontario, Puisne Judge of the Supreme Court of Canada, *vice* Hon. W. A. Henry, deceased.

ONTARIO.

Judge of the Court of Appeal.

James Maclennan, Q.C., Toronto, Judge of the Court of Appeal for Ontario, *vice* Hon. C. S. Patterson.

Police Magistrate.

Lanark.

F. A. Tallman, Merrickville, Police Magistrate for the township of Montague, in the county of Lanark.

DIVISION COURT CLERKS.

Brant.

David Baptie, St. George, Clerk of the Third Division Court of the County of Brant, *vice* J. P. Galloway, resigned.

York.

John Linton, township of York, Clerk of the Eighth Division Court of the County of York, *vice* John Paul, deceased.

Elgin.

A. N. C. Black, Dunwich, Clerk of the Fourth Division Court of the County of Elgin, *vice* F. McDiarmid, resigned.

DIVISION COURT BAILIFFS.

Peterborough.

R. Elmhirst, of Anstruther, Bailiff of the Fifth Division Court of the County of Peterborough, *vice* A. Graham, resigned.

Dundas, Stormont and Glengarry.

Wm. Cameron, of Lancaster, Bailiff of the Ninth Division Court of the united Counties of Dundas, Stormont and Glengarry, *vice* J. A. Robertson, resigned.

QUEBEC.

JUDGE OF THE SUPERIOR COURT.

H. G. Malhiot, Q.C., Three Rivers, a Puisne Judge of the Superior Court of the Province of Quebec.

Miscellaneous.

A KLEPTOMANIAC has been recently defined as one who does automatically what his ancestors did deliberately.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending October 27th and November 3rd contain State Socialism, *Contemporary Review;* Under Canvas in a Proclaimed District, *Blackwood's Magazine;* Our Diplomatists, *Temple Bar;* Impressions of Petersburg, *Contemporary Review;* Aut Diabolus, aut Nihil, *Blackwood;* A Winter in Syria, Part II., *Contemporary Review;* The Great American Language, *Cornhill Magazine;* Shakepeares Unawares, *Macmillan;* The Emperor Frederick's Diary, *Spectator;* An Autumn Evening in Whitechapel, *Daily News;* Savage *versus* Brute, *Times;* Mental Laziness, *Spectator;* The Centenary of the Calcutta Botanic Garden, *Nature;* The Saville Letters, 1660-1689, *Macmillan;* The Australian Dingo at Home, *Chambers's Journal;* Bishop Ken, by Archdeacon Farrar, *Good Words;* An Adventure in the Flooded Theiss, *Chambers's Journal;* Poor Harry, *Longman's Magazine;* "The First Son of Death," *Nineteenth Century;* and the usual amount of select poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk

(as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary, a petition, and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00

ntermediate Fee	$1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I. II., and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1888, 1890 } Souvestre, Un Philosophe sous le toits.
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

The Canada Law Journal.

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THE GREAT RAILWAY CASE.

REFERRING to the case now before the Supreme Court *in re* the Province of Manitoba and the Canadian Pacific Railway Company, we gather from the reports in the papers that Mr. Blake contended that the Manitoba Railway in question came within the description of those which had been declared by the Dominion Parliament to be for "the general advantage of Canada," and was, therefore, by the provision of the Constitutional Act in such case, withdrawn from the legislative authority of the Provincial Legislature, and exclusively placed under that of the Dominion Parliament, and was, therefore, unlawfully made under the Manitoba Act, contrary to the said provisions of the Constitutional Act, and was not entitled, under the Railway Act of 1888, to the benefit of the provisions therein made respecting railway crossings. Mr. Mowat, on behalf of the Province, maintaining that the provisions of the Constitutional Act did not prohibit the making of a railway declared to be "for the general advantage of Canada," but made it subject thereafter to the legislative authority of the Dominion Parliament, and placed it, when made, and until the said Parliament should otherwise direct, under the laws governing railways under its authority; that the Dominion Parliament had made no special provision as to the said railway, which was, therefore, entitled to the benefit of the provisions of the Railway Act of 1888, including those respecting railway companies and others, which by section 4 are declared to be applicable "to all railways, whether otherwise under the authority of Parliament or not"; and that this construction of the Imperial Act seemed more consistent with common sense, and with the allowance by the Dominion Government, acting, of course, under the opinion of the Attorney-General, and more consistent the intention of the Dominion Parliament, than the view which supposes it to have been intended to prevent the construction by a Province of a work entirely within its boundaries, because it was declared to be "for the general advantage of Canada."

The Imperial provision has been frequently extended to provincial railways, but always for the purpose, not of prohibiting them, but of extending them, so that they should be for the "greater advantage of Canada." It is difficult to believe that a Parliament which, in the then last session, had repealed the enactments establishing railway monopoly in Manitoba under one form, intended to re-establish it in another, which Mr. Blake's construction of the Imperial enactment would certainly do.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for November comprise 21 Q. B. D. pp. 413-460; 13 P. D. pp. 157-166; and 39 Chy. D. pp. 81-186.

PRACTICE—SPECIALLY INDORSED WRIT—BOND—PENALTY—8 & 9 WM. III. C. 11, S. 8.

Tuther v. *Caralampi*, 21 Q. B. D. 414, is a case which deals with a point of practice, which is not very clearly defined under our Consolidated Rules. The writ in the action was indorsed with a claim for £500, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff, of an annuity of £26 during the life of a child, and until she should attain sixteen, by quarterly payments; and alleged that two of such payments were in default. Charles, J., had rescinded the order of a Master allowing the plaintiff to sign final payment, under Ord. 14, r. 1, and from this decision the plaintiff appealed to the Divisional Court, contending that the debt sued for was a liquidated demand, for which the plaintiff was entitled to sign judgment, there being no defence. But the court (Lord Coleridge, C.J., and Hawkins, J.) dismissed the appeal, holding that the provisions of 8 & 9 Wm. III. c. 11, s. 8, constituted a special procedure in such cases, which was intended to be saved by Ord. 13, r. 14, which provides, "where the writ is indorsed with a claim or a bond within, 8 & 9 Wm. III. c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute, and in 3 & 4 Wm. IV. c. 42, s. 16." As we have neither a rule in force similar to the English rule, Ord. 13, r. 14, or the last mentioned statute, it is somewhat difficult to know what the practice in such cases is in this Province. It certainly seems objectionable, and contrary to justice, that the plaintiff should be at liberty to enter judgment, and issue execution for the full amount of the penalty. Such an action, notwithstanding its form, should, we are inclined to think, be either proceeded with as a claim for unliquidated damages, which should be assessed in the usual way, before final judgment is entered; or, if judgment be entered by default for the full amount of the penalty, there should be a suggestion of breaches, and an assessment of damages thereon before execution can properly issue. Although it must be confessed, as all former practice has been abolished, and no other provided to meet the case, it is hard to say what is the proper course.

HUSBAND AND WIFE—AGREEMENT FOR SEPARATION—POWER OF HUSBAND AND WIFE TO CONTRACT WITHOUT THE INTERVENTION OF A TRUSTEE—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—STATUTE OF FRAUDS, (29 CAR. II. C. 3, S. 4).

McGregor v. *McGregor*, 21 Q. B. D. 424, was an action by a wife to recover a sum agreed to be paid by her husband for her separate maintenance. The parties had taken out summonses against each other for assault, and had subsequently compromised the matter, and agreed to live apart, the husband agreeing

to allow the wife a weekly sum for maintenance ; and the wife agreeing to maintain herself and her children, and to indemnify the husband against any debts contracted by her. The action was brought to recover six weeks' arrears, and the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) held, affirming the decision of the Queen's Bench Divisional Court, 20 Q. B. D. 529 (noted *ante* p. 264), that the action was maintainable, and that the husband and wife could make a valid contract for separation without the intervention of a trustee, by way of compromise of legal proceedings. They also held that the agreement was not an agreement "not to be performed within one year," within the fourth section of the Statute of Frauds, and therefore need not be in writing. As regards the first point, the appellate court considered that as to part of the consideration for the contract, it was executed, by the wife withdrawing the summons against her husband, and living apart from him ; and this being so, it was immaterial whether or not her contract to maintain herself, and to indemnify her husband against debts contracted by her, could be enforced by the husband. Lindley, L.J., points out that the law on this subject has undergone important changes in recent times. Until *Wilson* v. *Wilson*, 1 H. L. C. 538, it had been considered against public policy for husband and wife to agree to a separation, that decision, however, had established the legality of such agreements. It had been customary to interpose a trustee for the purpose of supplying a consideration in the shape of his covenant, when otherwise there would be none ; but, he said, whenever there is a valid consideration as between husband and wife, there is no need of a trustee. As to the Statute of Frauds, the court was unanimously of opinion that when the agreement distinctly shows upon its face that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute ; but that when the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply ; this was the rule laid down by Tindal, C.J., in *Souch* v. *Sawbridge*, 2 C. B. 808, following *Boydell* v. *Drummond*, 11 East 142; and *Davey* v. *Shannon*, 4 Ex. D. 81, in which Hawkins, J., had come to a different conclusion, was therefore overruled.

DOG—"GOODS"—CONSTRUCTION OF STATUTE—MANDAMUS.

The Queen v. *Slade*, 21 Q. B. D. 433, may be referred to as establishing that under a statute authorizing a magistrate to issue a summons against a person detaining "goods" without just cause, he is authorized to issue a summons against a person who detains a dog without just cause. In other words, that a "dog" is "goods" within the meaning of the statute. And a mandamus was accordingly granted to a magistrate who had refused to issue a summons.

NUISANCE—RAILWAY COMPANY—LOCOMOTIVE AT STATION—NOISE OF STEAM.

Simkin v. *London and North-Western Railway Co.*, 21 Q. B. D. 453, was an action against a railway company for damages occasioned by the plaintiffs' horse being frightened by the defendants' engine, blowing off steam at a station, whereby

the plaintiffs' carriage was upset, and the plaintiffs injured. The plaintiffs were leaving the station in the carriage, when the accident happened. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient; but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. But, notwithstanding this finding, the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) held (Fry, L.J., reluctantly), that the defendants were not liable, because there was no evidence of any obligation on their part to screen the railway from the road, and affirmed the judgment of Huddleston, B., and Charles, J. It may be mentioned that the station and the roadway, and the fence dividing them, had been in the same condition, as they were at the time of the accident, for twenty years previously, and that 300 trains were accustomed to arrive at the station during every twenty-four hours.

SHIP—DAMAGE—WHARF—IMPLIED REPRESENTATION OF WHARFINGERS.

Proceeding now to the cases in the Probate Division, it may be useful to notice *The Moorcock*, 13 P. D. 157. This was an action brought by the owners of a vessel against wharfingers, for damages caused to the vessel in unloading the vessel at the defendant's wharf. The defendant, for a consideration, had agreed to allow the plaintiffs to unload at his wharf. In order to do this it was necessary to moor the vessel alongside a jetty of the defendants', which ran into a tidal river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained damage, owing to the uneven nature of the ground. The bed of the river at this point, where she took ground, was vested in a public body, and the defendant had control over it; but it was admitted they had taken no steps to ascertain whether it was suitable for the vessel to ground upon. It was held by Butt, J., that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause damage to the vessel, and that they were liable for the damage sustained by her.

VENDOR AND PURCHASER — MISDESCRIPTION — CONDITIONS OF SALE — UNDER-LEASE DESCRIBED AS LEASE—CONDITION THAT MISDESCRIPTION SHALL NOT ANNUL SALE.

In re Beyfus & Masters, 39 Chy. D. 110, was an application under the Vendors' and Purchasers' Act: houses were offered for sale, and in the particulars were stated to be held for ninety years from 24th June, 1844, at a ground rent of £21. The 4th condition provided that the title should commence "with the lease under which the vendor holds, dated 11th July, 1845." The 5th condition stated that "the description of the property is believed to be correct, but if any error should be found therein, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was, in fact, entitled to an under-lease for the residue of the term of ninety years, less two days, at a peppercorn rent, and the owner of the two days could not be found. The Court of

Appeal (Cotton, Bowen and Fry, L.JJ.) held that the representation that the property was held by lease, when it was, in fact, held by under-lease, was a fatal misdescription, and that the 5th condition did not apply, for that "error in the description of the property" meant only errors in the description of the physical property, and not a mistake in the description of the vendor's title; and, therefore, affirming the decision of Kay, J., that a good title could not be made. Fry, J., points out the substantial difference between a lease and under-lease, and that the outstanding two days would make it impossible for the tenant to surrender the lease to the freeholder and take a new lease.

WILL—LEGACY—HUSBAND AND WIFE—GIFT TO WIFE WHILE LIVING APART—CONDITION—LIMITATION.

In re Moore, Trafford v. *Maconochie*, 39 Chy. D. 116, the court was called upon to determine the legal effect of a legacy bequeathed in the following manner: the testator directed his trustee to pay to his sister, Mary Maconochie, "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week, for her maintenance while so living apart from her husband." The sister was married some years before the date of the will, but had never lived apart from her husband till sometime after the death of the testator. The testator's son was living, and was an infant. Kay, J., held that the bequest could not be construed as a gift to Mary Maconochie during the joint lives of herself and husband until the son attained twenty-one, upon a condition, that might be rejected as against the policy of the law, that she should live apart from her husband; but that it was a limited gift of weekly payments to be made during a period the commencement and duration of which were fixed in a way the law does not allow, and that, therefore, the gift was void; and in this decision the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) concurred.

PRACTICE—COSTS AS BETWEEN SOLICITOR AND CLIENT—JURISDICTION—ACTION AGAINST TRUSTEES OF A CHARITY FUND—UNJUSTIFIABLE LITIGATION.

Andrews v. *Barnes*, 39 Chy. D. 133, is a case in which Kay, J., dismissed an action brought by a vicar and churchwardens of a parish to recover from the defendants a fund of small amount, which the plaintiffs claimed was held by them for a charitable purpose connected with the parish, upon a condition which had become incapable of fulfilment; and being of opinion that the action was unjustifiable, he ordered the plaintiffs to pay the defendants' costs, as between solicitor and client. The plaintiffs appealed on the question of costs, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), held that he had jurisdiction to make the order as to costs, and refused to alter it. Fry, L.J., who delivered the judgment of the court, points out that the jurisdiction in equity regarding costs was essentially different from that at common law, and, from a consideration of the authorities, he concludes that there was inherent in the Court of Chancery, at the time of its abolition, a general and discretionary power to award costs, as

between solicitor and client, to a successful party, as, and when the justice of the case might so require, and as regards suits within the former equitable jurisdiction, the power still exists in the High Court; but, whether the High Court has power to award costs, as between solicitor and client, in matters of common law jurisdiction, he expressly refrained from giving any opinion.

WILL—LEGACY—SATISFACTION—CONTEMPORANEOUS DEED AND WILL.

Horlock v. *Wiggins*, 39 Chy. D. 142, is an instance of the result, which too often happens, where a testator undertakes to draw his own will. By a separation deed, dated 7th September, 1844, he had covenanted that his executors should, on his decease, pay to his wife, if she survived him, £100, with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated the 5th September, 1844, but alleged to have been signed on the 9th, he made the following bequest: "After all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100, as per indenture stated in our mutual separation." The testator died in 1887, and the question was, whether this bequest was to be deemed to be a satisfaction of the testator's covenant contained in the separation deed, Kekewich, J., held that it was not, and this view was sustained by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.). One of the grounds on which this decision was arrived at was the fact that the will directed payment of the legacy after payment of the testator's just debts; and the £100 in the separation deed was a debt existing when the will was made. Though the reasons assigned may be sufficient, from a legal point of view, to warrant the construction adopted, we nevertheless feel morally sure that that construction does not really carry out the intention of the testator.

HUSBAND AND WIFE—GIFT TO HUSBAND, WIFE, AND THIRD PERSON—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT. 75, SS. 1 & 5)—(R. S. O. C. 132, S. 3).

In re Jupp, Jupp v. *Buckwell*, 39 Chy. D. 148, the question which was raised *In re March*, 24 Chy. D. 222, but not actually decided, came up again for decision, viz., whether under a gift to a husband and wife and a third person, made since the Married Women's Property Act, 1882, the parties take severally one-third, or whether the husband and wife together take one moiety, and the third person the other moiety, Chitty, J., assuming the case to be within the Married Woman's Act of 1882, decided that they took in thirds; but on appeal this decision was reversed, on the ground that the case was not within the Married Woman's Property Act, 1882. Now Kay, J., holds that the Married Woman's Property Act, 1882, has made no change in the common law rule in this respect, and that the husband and wife only take a moiety between them. The true view of the effect of the Act he considers to be that it was not intended to alter any rights except those of the husband and wife *inter se*.

WILL — CONSTRUCTION — REMOTENESS — TENANT FOR LIFE, PAST CHILD-BEARING — EVIDENCE.

In re Dawson, Johnston v. *Hill*, 39 Chy. D. 155, the principal question was, whether, for the purpose of maintaining a bequest, which was *prima facie* void for remoteness, it is admissible to prove the tenant for life, to whose grandchildren the bequest was made, was past child-bearing at the time of the testator's death. Chitty, J., held that the evidence was not admissible.

PRACTICE—WRIT OF ASSISTANCE.

In *Wyman* v. *Knight*, 39 Chy. D. 165, it was held by Chitty, J., that although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession, the writ may still be issued for the purpose of recovering possession of, and preserving, chattels, which had been ordered to be delivered to a receiver. The chattels in question were securities and documents of title, locked up in the safe of an absconding trustee.

POLICY OF LIFE INSURANCE—PAYMENT OF PREMIUMS BY PERSON NOT BENEFICIALLY ENTITLED—TRUSTEE—INDEMNITY LIEN—SALVAGE.

In re Winchelsea, 39 Chy. D. 168, a person, who was a trustee of a term, upon trust to apply the rents in paying the interest due on mortgages made by a *cestui que trust*, and of the premiums on policies of insurance effected by the mortgagor as collateral security for the mortgages. The rents having become insufficient, the trustee, in order to prevent one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or mortgagor. The life insured having dropped, the trustee claimed a lien on the proceeds of the policy for the premium so paid by him as against the mortgagees; but it was held by North, J., that he was not entitled to the lien, he not being a trustee of the policy; and that the right of a trustee to be indemnified, out of his trust fund, for money expended by him in its preservation, is strictly limited to the trust fund. The case is a hard one, but the law seems to be sound.

PRINCIPAL AND SURETY—CROWN DEBTS—ADMINISTRATION PRIORITY.

In re Churchill, Manisty v. *Churchill*, 39 Chy. D. 174, North, J., held that a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of the principal's estate. See *ante* pp. 431, 487.

SOLICITOR—TRUSTEE—MORTGAGE—NEGLIGENCE—STATUTE OF LIMITATIONS.

Dooby v. *Watson*, 39 Chy. D, 178, was an action against the executor of a solicitor for negligence in making an investment for the plaintiff on a mortgage security. It appeared by the evidence that the plaintiff had approved of the mortgage, and that the solicitor merely did the legal part of the business, and was not in the position of a trustee. It was held by Kekewich, J., that the

Statute of Limitations was a good defence. In the course of his judgment, the learned judge lays down the following rule: A solicitor, in advancing money on a mortgage, may be employed (1) to invest in a particular mortgage; (2) to find securities to be approved by the client, and then invest the money; (3) to find securities, and invest the money, the client taking little or no part in the business; and, in an action for negligence, he holds that the Statute of Limitations would be a good defence in the first case, and also in the second case, if the client has approved of the mortgage; but in the third case, we gather from his judgment, though he does not say so, he becomes a *quasi* trustee, and the statute is no defence.

APPARENT FIXTURES.

IT IS not the chattel mortgage that preserves the original character of the property. It is the intention of the parties. Such mortgage is very cogent evidence of such intention, for no one would mortgage as personalty what was not intended to remain personalty. If the intention then dates back of the annexation, the fact that the mortgage upon the chattel was not executed till afterward cannot affect the question. But if the chattel has once become a fixture, and as such a part of the realty, then no subsequent agreement or intention can affect its character. It is on this ground that the decision in *Trull* v. *Fuller*, 28 Me. 545, can be reconciled with the majority of the cases. The chattel mortgage in this case was upon property already attached to the realty. Of course, such a mortgage could not convert into personal property what had once been real estate. A purchaser without notice at an execution sale of the real property was held to be the owner of the property sought to be affected by the chattel mortgage in a suit brought by the chattel mortgagee to recover the value of such property in trover. The best considered cases hold that a purchase of the realty for value without notice, either actual or constructive, takes title to whatever appears to be a fixture, provided, of course, it was attached to the realty with the knowledge of the person claiming it, or to have a lien upon it. All the decisions heretofore cited, except those from New York and Maine, recognize this rule as sound. In addition, the following cases cited are to the same effect: *Ridgeway Stove Co.* v. *Way*, 141 Mass. 557; S. C. 6 N. E. Rep. 714; *Davenport* v. *Shants*, 43 Vt. 546; *Southbridge Sav. Bank* v. *Exeter Machine Works*, 127 Mass. 542; *Hunt* v. *Bay State Iron Co.*, 97 id. 279; *Thompson* v. *Vinton*, 121 id. 139; *Pierce* v. *George*, 108 id. 88; *Rowand* v. *Anderson* (Kan.), 6 Pac. Rep. 255; *Pierce* v. *Emery*, 32 N. H. 484; *Haven* v. *Emery*, 33 id. 66. See *Strickland* v. *Parker*, 54 Me. 263. These cases all recognize that notice would preclude the purchaser or mortgagee from claiming the chattel as a fixture.

In *Pierce* v. *George* the court practically decided that the recording of the chattel mortgage was not notice. The question was not discussed, but the plain-

tiffs, who sought to recover for the conversion of the property affixed to the realty, claimed under a chattel mortgage thereon duly recorded with the records of personal property. Defendant claimed under a real estate mortgage, and he had judgment as to all of the property attached to the realty. The question of notice, either actual or constructive, is not referred to in the opinion, and the case is far from being satisfactory.

Powers v. *Dennison*, 30 Vt. 752, is an important decision on the question of notice. A building was erected by one upon the land of another. It was so attached to the land that it would have become a fixture had it not been for the implied understanding that the erector of it should have the right to remove it. The court held that a subsequent mortgagee of the real estate took a lien upon the building, and could hold it as against the owner, and that the possession of the building by the owner of it was not notice to the mortgagee of his rights. This case, so far as the question of constructive notice by possession is concerned, cannot be regarded as sound.

The decision of the court in *Voorhes* v. *McGinnis*, 48 N. Y. 278, is, so far as the reasoning of the court is concerned, indefensible. A chattel mortgage was executed upon boilers and an engine, which were subsequently placed in a mill. But they were so attached to the building that they could be removed without material injury either to the building or to the engine and boilers. The court held the lien of a subsequent real estate mortgage prior. The decision was not placed upon the ground that the real estate mortgagee had no actual notice of the chattel mortgage, and that it not being filed, there was no constructive notice. The chattel mortgage may have been filed, but the case does not disclose that fact. The court rested its judgment upon the following reasoning: "I am of opinion upon general principles—that is, unless there be some specific agreement to the contrary, or some circumstances controlling the general rule that the boilers and engines, shafting and gearing, became a part of the realty and passed to the plaintiff upon his purchase. It is said that the execution by Kimmey of a chattel mortgage upon it before it was placed in the mill would be sufficient to preserve its personal character. Although unknown to the plaintiff, this fact existed in the case. It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages so that the creditors can despoil the house to obtain their possession or compel the owner to pay their value?" With all deference to the judge who wrote this opinion, this is *not* what the case came to. The same judge had just before stated in his opinion that the engine and boilers could be removed without material injury. Would that have despoiled the building? The case before the court and the case put by the court, as illustrating to what an injustice the rule

holding the engine and boilers chattels would lead, were widely dissimilar. No one has ever doubted that in the case the court mentioned the property would be real estate. The rule has invariably been stated with the limitation that there must be no material injury to the fixture or the freehold involved in the removal. How illogical, to attack a rule restricted in its operation by citing the consequence of its operation beyond its restrictions. This is the reasoning of the court. There is a strong dissent in the case, the judges standing three to two.

The decision in *Fryatt* v. *Sullivan Co.*, 5 Hill, 116, affirmed by Court of Errors, 7 Hill, 529, is placed on the ground that the annexation was of such a nature that the chattel could not be removed without material injury, and it is on this ground that this case is distinguished in *Ford* v. *Cobb*, 20 N. H. 351.

The annexation of the chattel to the land must be with the knowledge of the owner of it, or the one holding a lien on it. The act of the owner of the chattel in attaching it to realty, cannot prejudice the lienor unless he knows of it or impliedly consents to it. This demonstrates the absurdity of the reasoning of the court in the case of *Voorhes* v. *McGinnis*, just cited, for in the case put by the court the chattel mortgagee *could* have insisted upon his lien, even after the brick and timber had become part of the house, if he did not consent to their being used in the construction of the house, or known of it. It is true he could not tear down the house or replevy the materials, but he could sue for conversion, and recover their value as against the owner of the house.

Whether the filing of a chattel mortgage is sufficient to give notice to a purchaser of the realty that apparent fixtures are personalty, is as we have seen a question about which there is a decided difference of opinion. There is certainly less authority against the doctrine that such filing is notice than there is in favour of it. But the spirit of the registry laws of this country are in harmony with it, and would even seem to require such a rule. On the other hand, there are more decisions in support of the contrary rule. Moreover, it cannot be said that the *letter* of the various recording acts comprehends the case of a chattel, which in spite of its annexation to the land, remains personalty, for this would involve the assumption of what is the exact reverse of the fact, *i.e.*, that the chattel has become a fixture. The recording acts do not attempt to affect any property which is not in fact real estate, and when it is admitted, as it is by all the decisions, that in certain cases the chattel does *not* become a fixture, then the letter of the recording act does not touch the case at all. In answer to the argument founded upon the spirit of such acts, may it not be said that notice is given in just the manner that the spirit of such acts requires. It is true that the notice is in a different record, and may be in a different office; but it is a public record, and can the purchaser of the land claim that he was not bound to look to such a record, for the reason that he had a right to assume that the property alleged to be personalty was a fixture? In view of the well-settled rule that such property may or may not be a fixture according to the intention of the parties interested in it, has the purchaser an absolute right to regard it as a fixture without examining a public record where the record of a lien upon it

as personalty would disclose the fact that it is not a fixture? The moment it is admitted that personal property affixed to the realty in a certain manner is not necessarily a fixture, it becomes the duty of the purchaser to ascertain whether it has been incumbered as personal property by an examination of the records where such an incumbrance would be found. Is there any hardship in this? There would certainly be none whatever after the rule had been settled, as purchasers could then conform to it. On the other hand, the interests of trade would be subserved by protecting the chattel mortgagee, for without such protection the vendor of machinery and other property which can be used only by attaching it to the freehold, would be unwilling to sell on this kind of security, and in many instances the purchaser is unable to pay cash or give any other security. The vendor would not care to take a mortgage on the realty, as that would postpone his lien to a prior mortgage not only as to the land as it was before the chattel was attached to it, but also as to the chattel itself, which would then become a fixture. There is a strong dissent from this view by Judge Dillon in *Bringhoeff* v. *Munzenmaier*, 20 Iowa, 513; but what was said was *obiter*, as the chattel which was mortgaged as such was at the time attached to the real estate, and had prior to the giving of the mortgage been a fixture. He says: "They had no constructive notice of the plaintiff's right, because the plaintiff's mortgage was a chattel mortgage, and recorded and indexed as such. There never having been any actual severance of the articles in question, and the same being admitted to constitute as between vendor and vendee part of the realty, a subsequent purchaser would not be bound to take notice of a chattel mortgage thereon; the statute requiring those to be separately recorded and separately indexed. If the defendants at the time of their purchase had been shown to have had knowledge of the plaintiff's mortgage, the question then arising would be much more difficult of solution. But without such knowledge it appeared to us plain that the defendants had the title to the property in question. Any other rule would practically nullify the registry laws, or else introduce the startling doctrine that in examining the titles to real estate, the searcher must also examine the records of chattel mortgages. If the defendants, prior to their purchase from Rawson, had visited the premises, they would have seen the property in question, constituting to all appearances part of the real estate. There would be nothing on the ground, and nothing in the nature of the property, to advise them of the plaintiff's adverse right or ownership. Rawson, and not the plaintiff, it seems was in possession. If defendants should then examine the records of real estate transfers, they would there discover nothing advising them of the plaintiff's claim. They are therefore entitled to and do stand free from it." *Sowden* v. *Craig*, 26 Iowa, 162, appears, as we have seen, to hold the contrary.

In *Sisson* v. *Hibbard*, 75 N. Y. 542, the court ruled that a purchaser at an execution sale was not a *bona fide* purchaser, and could not claim chattels as part of the realty which were annexed to the realty with the understanding that they were to remain personalty.

Nothing can be constructively severed from the freehold and made person-

alty as against an innocent purchaser of the land, even if the contract be recorded, unless, of course, it is recorded among conveyances of real estate. If it is found there, the recording act makes it constructive notice. But if it is a chattel mortgage of what was part of the real estate, the filing and recording of it among chattel mortgages is no notice whatever. Nothing short of an actual severance of the thing will suffice. *Lacustrine Fer. Co.* v. *L. G. & Fer. Co.*, 82 N. Y. 476, where the court say: "We think it must be a general rule that the owner of land cannot by agreement between himself and another make that which in its nature is land, personal property as against a subsequent purchaser for value without notice, there having been no actual severance of the subject of the agreement, when the subsequent grant was made, and we are also of opinion that in the case supposed, the doctrine of constructive severance cannot be applied to defeat the rights of subsequent purchasers."

Fryatt v. *Sullivan Co.*, 5 Hill, 116, is considered as holding that where one converts to his own use the chattels of another by annexing them to the real estate in such a manner that they cannot be removed without serious injury to the freehold and the real estate, with such chattels attached, is afterwards sold to an innocent purchaser, the former owner of the chattels cannot maintain trover against such purchaser of the real estate. This case was affirmed by the Court of Errors, 7 Hill, 529. But it does not lay down any such doctrine. The owners knew that the chattels (engine and boiler) were affixed to the real estate, and they being so annexed to it that they could not be removed without destroying the building in which they were placed, and the owner having knowledge of the annexation, must be deemed to have assented to it as against an innocent purchaser. The decision was based upon this ground. Bronson, J., says: "But there can be no doubt that they acquired just as good a title to the engine and boilers as they did to the rest of the real estate." There was no opinion in the Court of Errors.

In a dissenting opinion in *Morrison* v. *Berry*, 42 Mich. 389; S. C. 36 Am. Rep. 446, Judge Cooley says: "It was said by Mr. Justice Ladd, in *Cochran* v. *Flint*, 57 N. H. 514, 547, that if it were held that A, having in his possession the movable thing of B, annexed it without consent of the owner to the real estate of C, it would thereupon, and by force of that act alone, become the property of C. Such a decision, so far as his investigation had extended, would stand alone, and would be so manifestly contrary to reason and justice, as well as the fundamental principles of law relating to the acquisition and ownership of property, that he could only follow it from a reason of duty that would amount to moral compulsion. We have been as much unable as that learned judge was to find any such decision. One man cannot give away the property of another in this manner. The consent of parties that shall convert a chattel into an inseparable part of realty, is the consent of the parties owning the *chattel* and the realty respectively." The prevailing opinion did not conflict with these views of Judge Cooley. The owners of the chattel had consented to the annexation of the same to the freehold. But Judge Cooley held that this consent was annulled by fraud, and the other judges held that it was not. Here the difference between the two

opinions lay. *Stillman* v. *Flenniken*, 58 Iowa, 450; S. C. 43 Am. Rep. 120, holds another contrary to the above opinion. It appears from the case that the owners of the chattel knew that it was annexed to the land. This is not directly stated in the case, but the reasoning of the court leads to this conclusion. *D. & Bay City R. Co. Busch*, 43 Mich. 571, seems to hold that the grantor of the realty is not liable in any case where the chattel of another has been affixed to the land without his consent, and the grantee subsequently buys the real property.

A railroad company was sued for the conversion of certain ties which had been placed on the road-bed by contractors before the road was turned over to the company. But the language of the court modifies the apparent scope of the decision: "Having deliberately chosen to wait until the property not only changed custody, but was also annexed still more firmly by ballasting, he cannot now treat as personalty in the hands of the railroad company converted by a mere failure to give it up on demand, what became to *his knowledge* a part of the realty in the hands of the contractors, against whom he had a remedy for the only conversion that ever took place.—*Albany Law Journal.*

Reviews and Notices of Books.

Mr. Pollock's treatise on the general principles concerning validity of agreement in the law of England and America has been re-published by the Blackstone Publishing Company, of Philadelphia, from the fourth English edition. It contains notes on the American cases by Franklin S. Dickson. This book will be a valuable addition to the series now so well known to the profession. We notice a large number of valuable text-books recommended by the editor for re-printing next year.

Notes on Exchanges and Legal Scrap Book.

STATUTE OF FRAUDS.—In *Slingerland* v. *Slingerland*, lately before the Minnesota Supreme Court, the defendant had proposed orally to the plaintiff to discontinue four other actions between them, and to allow the defendant the money involved in a fifth one; and, in consideration of so doing, offered to convey to him a certain farm, and the personal property on it, on the day that the plaintiff should marry a young lady then named by him. The plaintiff then orally accepted the proposition, dismissed four of the actions, and allowed the defendant the money involved in the fifth one. He also married the young lady; but when he thereafter demanded the conveyance of the farm, as agreed upon, the defendant

refused to execute it. The case turned upon whether there had been such a part performance as to take the case out of the Statute of Frauds. The plaintiff's marriage does not seem too have been any part of the consideration for the defendant's agreement to convey, and so it may be left out of view. The point was, whether the discontinuing of these four actions by the plaintiff, and his allowing the defendant to have the money involved in the fifth one, was such part performance as to take the case out of the Act. The court held that it was. It was suggested that one remedy open to the plaintiff was to bring an action for damages for the loss sustained by reason of the dismissal of the former actions, and the court thought that though such an action would be novel, it might be maintained, but the difficulties in the way of successfully prosecuting would be very great. It was held that an action for damages could not afford adequate relief. The dismissals were not made on a money consideration, nor did the parties intend the value of the actions to be measured by a money standard. In no way could the loss of the advantage in having the actions tried at the earlier, instead of the later, date be estimated in damages, nor any recovery be had for it.

INJURY TO TRESPASSING CHILD.—The Supreme Court of Minnesota, in *Twist* v. *Winona & St. Paul Railway Co.*, has also given us a decision on the liability of a railway company for damage sustained by a trespasser. A boy ten or eleven years old, of average intelligence, who had often seen, and had a general knowledge of the structure and working of a railway turn-table, and had often been warned by his father that it was dangerous to play upon it, and that he must not do so, and who knew, too, that the railway company prohibited children from playing upon the table, and that he had no right to do so, was swinging upon it while in motion, and was injured. In an action for damages it was held that, though the boy might not understand the full extent of his danger, yet his conduct amounted to contributory negligence. The plaintiff cited *Keefe* v. *Railroad Co.*, 21 Minn. 287, and *Railroad Co.* v. *Stout*, 17 Wall. 657, in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to suppose that young children will be attracted to and play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are exposed. In the *Keefe* case, the attractiveness of such machinery as a plaything for children, and the danger of its alluring them into perils of which, for their lack of judgment and discretion, they cannot be aware, and against which they cannot protect themselves, was dwelt on; and that such children, it was reasoned, may be said to be induced by the owner's own conduct to come upon the premises; and that what an express invention is to an adult, such an allurement is to a child. In the present case, however, it was held, that when a child of such tender years as not to be capable exercising judgment and discretion cannot be charged with contributory negligence, this rule cannot be applied to all children, without regard to their age or capacity. Children may be liable for their torts or crimes, and may be guilty of negligence.

The opinion of the court seems to favour the modification of the judgment in the *Keefe* case, but upon the facts it was not necessary to determine whether the charge of negligence against the defendant could be sustained. A child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.

INJURY TO PERSONS ON RAILROAD TRACK.—The Virginia Supreme Court, in *Virginia M. Railway Co.* v. *Boswell's Administrator*, decides that in the case of a trespasser on their track, who is killed or injured, the railroad company is not liable for anything short of wilful and wanton injury. In this case the track-walker of the railroad company discovered a man, about ten o'clock at night, lying on the track in such a position that a passing train would kill him, and when he aroused him, and warned him of his danger, the man showed no signs of intoxication. The track-walker then passed on, and the trespasser was killed about two hours later by an express train. It was held that the track-walker was guilty of no negligence, which rendered the company liable. It was contended that the failure of the track-walker to signal and stop the train was the proximate cause of the injury, and such negligence on the part of an agent as to leave the company liable for damages. The Court of Appeal decided against the contention. The deceased was a trespasser, and was guilty of gross and culpable negligence, either through wilfulness or intoxication. There was no evidence of his being ill. In cases of intoxication or gross recklessness, such as this, the prevailing opinion is stated to be that the company is not liable for anything short of wilful and wanton injury. In *Herring* v. *Railroad Co.*, 10 Ired. 402, two intoxicated slaves fell asleep upon the track, where they could have been seen by the engineer, if he had been looking, for a distance, variously estimated at from 200 yards to half a mile, and were killed by a passing train. It was held by the court that their being upon the track in a condition of helpless intoxication, was such contributory negligence as should prevent a recovery unless the company was guilty of wanton injury. See also Beach on Contrib. Neg. 294, note; and cases cited there, id. 205, note 3. But it was contended that the case came within the general rule, that the plaintiff may recover, although he has been guilty of negligence or want of ordinary care, which has contributed to cause the accident, if the defendant could, by the exercise of proper care and caution, after having knowledge of the plaintiff's negligence, have avoided the mischief which happened. *Railroad Co.* v. *Anderson's Administrators*, 31 Grat. 815; *Dun* v. *Railroad Co.*, 78 Va. 645; *Rudd's Administrators* v. *Railroad Co.*, 80 id. 546. The question then became whether, in the present instance, the track-walker had done all that could reasonably be expected of him. Upon this point the Supreme Court had no difficulty in deciding in the affirmative. When aroused and told that he must get up and go off the track, Boswell partly raised himself, leaned upon his elbow, and assented to the suggestion in such a way as to convince the track-walker that the deceased was capable of taking care of himself.

MAY RAILWAY COMPANIES EXPEL PASSENGERS?—One of the most annoying incidents in a railway journey is the loss of a ticket; and it is made more acute by the arbitrary manner which railway officials assume in virtue of the accident. Even if the passenger, as too often happens, to save trouble, pay his fare over again, he is treated with impatience by the ticket-collector, and with black looks by his fellow-travellers, who are being delayed. If he does not pay or is without his purse, unless he is a very well-known person, the usual course hitherto has been to turn him out of the carriage with ignominy, detain him till his train has gone, and leave him stranded away from his destination. It has been an article of faith with railway officers, from the chairman to the ticket-collector, that this way of dealing with the matter is just and lawful, and the railway solicitor, when appealed to, has whispered the comforting words, *Wood* v. *Leadbitter*. The case of *Butler* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 57 Law J. Rep. Q. B. 564, in the Court of Appeal, will rudely dispel these notions, which were sufficiently rooted to be accepted by Mr. Justice Manisty at the trial at Leeds. All the judges of the Court of Appeal agree that *Wood* v. *Leadbitter* has no application whatever, and that the company's by-laws, even assuming them to have any force, do not authorize turning passengers adrift. The decision turned entirely on the meaning of the by-laws, and assumed, by way of argument, a great deal in favor of the railway company, which is not law. The only word said in favour of them was by Lord Justice Lindley, who confessed a doubt whether railway companies are not occasionally placed in great difficulties by reason of the unscrupulousness of some persons, and reserved his opinion whether a by-law might not be framed to justify them in doing what was done in the present case. As to this doubt, it is not shared by Lord Justice Lopes; and as to the difficulties in which railway companies are placed, it is not easy to see them. If a fraud is being committed, they no doubt have a right to act as they do; but, like everyone else, if they make a mistake they must take the consequences. The facts of the case were of a very familiar type in railway litigation. Mr. Butler paid the company half-a-crown for a ticket, from Sheffield to Manchester and back, by an excursion train. He gave up one-half, and on his return-half being demanded he found himself without it. Mr. Butler gave the ticket-collector his name and address, and explained the facts, but would not pay the 3*s.* 5*d.* demanded of him, being the full third-class fare from Manchester to Sheffield. Thereupon he was removed from the carriage, detained for some time, and eventually turned off the company's premises. The ticket had on it the usual "See back," supplemented by an endorsement that it was issued subject to the conditions contained in the company's time-tables, which duly displayed the familiar series of by-laws. Among these was, of course, the intimation that any traveller without a ticket shall be required to pay the fare from the station whence the train originally started. This by-law appears to be still sanctioned by the Board of Trade, although it is obviously unreasonable and contrary to law, and has been so pronounced. It never could have been the intention of Parliament to allow railway companies to fine a passenger who travels from Willesden to Euston to the extent of the fare from

Edinburgh. The continued vitality of this by-law is an illustration of the helplessness of the travelling public in the hands of the railway companies. Even if it were reasonable, it would not be binding on the passenger as part of the contract, as it is equally well established that taking a ticket with a mere reference of this kind does not incorporate the by-law in the contract. These points were not dwelt upon in the judgment of the court, but if possible a still weaker point in the company's case was fixed upon—namely, that the by-law did not profess to authorize the removal of a passenger as a penalty for its infringement. Such an authority was professed to be given in the case of illicit smoking, drunkenness, and such eccentricities as insisting on travelling on the roof, in the guard's van, or on the engine. The company's defence was somewhat mixed. A contract arising from the by-law, or implied from the contract of carriage was set up; but, even assuming its existence, it would only give the company a right to damages for the breach of it by the passenger, and would not justify them in turning the passenger out of the carriage or off the premises. The only plausible defence of the company lay in *Wood* v. *Leadbitter*, 14 Law. J. Rep. Exch. 161, the well-known case of the ticket for a grand stand, which was held merely to constitute a revokable license, and not to be a grant of a temporary easement. The railway company conld only rely on this case in their character as proprietors of the soil. It is possible that they are entitled to rely on it to the extent that removing the plaintiff was not a trespass in the strict sense of the term. A person who sits in the carriage of another, whether the carriage is in the high road or on the land of the owner of the carriage, may be removed from it by the owner using, as in this case, only necessary force; but while the act does not amount to a trespass or assault, it may amount to a breach of contract, if there is a contractual relation between the parties. Railway companies are carriers first, and proprietors of land secondly. If they break their contract of carriage by any act which is justified in their character of proprietors, they must pay damages not for assault, but for breach of contract, which comes to the same thing. The plaintiff in the case under discussion brought his action for an assault and false imprisonment, and in so far as there was detention, no doubt there was a trespass; but the case is an authority where there is no detention, and where the act amounts to a breach of contract only, and can be justified from the proprietor's point of view. In such a case it is well to frame the claim for a breach of contract, with, perhaps, a claim for an assault in the alternative. This distinction was in the mind of Lord Justice Lindley, when he made an even more disturbing suggestion than that as to the potentiality of the by-law-making powers of railway companies—namely, that of *Wood* v. *Leadbitter* is "no authority that an action will lie not for breach of a contract to give an easement." Could it be said that the contract in that case was not a contract concerning an interest in land in the words of the Statute of Frauds? On the other hand, it cannot be said that a contract to carry from London to York concerns an interest in land at all.—*English Law Journal.*

DIARY FOR DECEMBER.

2. Sun.....*1st Sunday in Advent.*
4. Tues ...General Sessions and C.C. sittings for trials in York.
6. Thur....Chancery Division H.C.J. sits.
8. Sat.....Sir W. Campbell, 6th C.J. of Q.B., 1825. L. S. Michaelmas term and H.C.J. sittings end.
9. Sun.....*2nd Sunday in Advent.*
11. Tues....General Sessions and Co. Ct. sittings for trials, except in York.
16. Sun.....*3rd Sunday in Advent.*
21. Fri.....Shortest day St. Thomas.
23. Sun.....*4th Sunday in Advent.*
24. Mon....Christmas vacation begins.
25. Tues ...Christmas day. Sir M. Hale died, 1676, æt. 67.
26. Wed....St. Stephen.
27. Thur....J. F. Spragge, 3rd Chan., 1869.
30. Sun.....*1st Sunday after Christmas.* Holt, C.J., born, 1642.

Reports.

THIRD DIVISION COURT OF THE COUNTY OF ONTARIO.

[Reported for the CANADA LAW JOURNAL.]

RAY *v.* ADAMS *et al.*

Horse-race — Statutes 13 *Geo. II. c.* 19, *and* 18 *Geo. II. c.* 34*—Division of purse — Construction of racing rules.*

The statutes of Geo. II. affecting horse-racing are in force in this country, and, therefore, a race for a purse of $200, divided into $120, $50 and $30, for first, second and third horses is illegal, and the purses cannot be sued for.

Where there is a discrepancy as to the conditions of a race between the newspaper advertisement and the bill-posters, the former should govern. But, assuming that the race was legal, the plaintiff having clear notice before he entered his horse of the conditions under which it would be run, and having failed to follow up his protest before the tribunal appointed by the Rules of the Canadian Turf Association to consider such protests, he was not entitled to recover.

[DARTNELL, J.J.—Whitby.

This was an action brought to recover the sum of $30, under the following circumstances:

A self-constituted committee, of which the defendants Meharry and Gordon were members, arranged for a summer race meeting in Port Perry last July; stated to be "under the auspices of the Ontario Central Agricultural and Driving Park Association," of which the defendants, Adams and Christie, were officers, and whose names, as such officers, were appended without their knowledge or assent to the advertisements of the event. They did not take any part in the conduct of the race, and were present only as spectators. One of the events for competition was a trotting race for a purse of $200, divided into $120, $50 and $30, for first, second and third horses respectively. According to the advertisement, drawn up by one McKay, with the knowledge and approbation of the other members of the committee, except Adams and Christie, this race was to be open to all trotting horses who had not beaten 2.40 before the first of June; in other respects the Rules of the Canadian Turf Association were expressed as governing. By these rules, if no date of qualification is published, the last day for entry would be the date of such qualification; in this instance being 30th June. Subsequently a draft from the advertisement from memory was made by McKay, and bill-posters, intended to be a duplicate of the advertisement, were prepared and distributed as advertisements or posters. In the last no mention was made of the 1st of June as the time for qualification. This was stated to have been an inadvertent omission, as the first advertisement was what was intended should fix the date. It was stated on oath that the earlier date was fixed for the purpose of inducing owners at a distance to enter their horses. This advertisement was inserted in the *Canadian Sporting Times*, which, it is stated, is regarded as the official organ of the Turf Association, and has a large circulation throughout the Dominion and elsewhere. This was seen in Montreal by one Winch, who thereupon entered his horse, as he states, upon the faith of the conditions, and without even having seen, up to the day of the race, the printed posters.

The plaintiff admitted that he had seen the advertisement in the *Canadian Sportsman*, and also the posters, before he made his entry; and, for the defence, it was sworn to that, before making his entry and paying his entry fees, he was told that the race would be trotted under the rules in the advertisement in the *Times*, and not those in the posters. As he was not called to deny this, it must be taken as proved that he entered and started his horse with that knowledge.

Before the horses started, a written protest was handed in to the judges on behalf of one Sebert, who also had a horse entered, claiming that Winch's horse was disqualified, as having made 2.37½ on the 19th of June, at

Montreal, a fact which Winch admitted. The judges allowed the horses to start, subject to the protest, and first place was awarded to Winch's horse, "Sleepy Dan," plaintiff's horse being fourth. The defendant, Meharry, subsequently paid over first money to Winch, and the plaintiff brings this action on the ground that, Winch's animal being disqualified, his horse is entitled to third money. The judges came to no decision as to which date was to be regarded, the 1st or 30th of June, nor were any steps taken to bring them together to arrive at any decision, and, in fact, the money was paid over apparently without their interference or direction.

The Rules of the Turf Association point out the duty of dissatisfied parties in respect to following up the protest for the purpose of obtaining a decision from the judges, or the appellate tribunal. Under such rules this has to be done within three weeks of the race, after which the stakeholder is at liberty to pay over stake or purse. No such steps appear to have been taken in this case, and it is contended for this reason also the plaintiff is out of court.

DARTNELL, J.J.—Horse-racing, like wagering, is not illegal at common law, and any contracts expressed or implied arising thereout can be adjudicated upon in the courts, unless there is statute law to the contrary.

The statutes of England relating to horse-racing, passed prior to 1792, appear to be in force in Canada, unless varied or repealed by any statutes passed here since that date; but any statutes passed in England varying or repealing such former Acts have no effect in this Province.

Parliament in England during 400 years has passed a series of Acts relating to the subject. These are as follows:—

16 Car. II. c. 7. This is the first statute in which horse-racing is mentioned. Under it, persons winning by fraud or cheating at various sports, including horse-racing, were to forfeit treble the sum or value of the money so won.

9 Anne, c. 14, "Which statute, although repealed in England, is not repealed as regards this Province" (per HARRISON, C.J., *Bank of Toronto* v. *McDougall*, 28 C. P. 352). Under this Act all mortgages or securities, the consideration of which was for money won at gaming or betting, are void; the loser of £10 or upwards might sue within three months of the loss; failing, an informer could do so, and recover treble value. The winning of money by fraud was declared an indictable offence, the guilty party to forfeit five times the value, and be punished as for wilful perjury. The word "games" in this Act was held to comprehend horse-racing (*Bank of Toronto* v. *McDougall*, supra; *Blaxton* v. *Pye*, 1 Wils. 309). Therefore, any race for £10 a side or upwards was illegal. It is stated that, after the passing of this Act, "the number of horse-races had very much increased, and in consequence of their being run under £10 a side, and, therefore, for small plates, they had contributed very much to the encouragement of idleness; and the breed of strong and useful horses was supposed to be much prejudiced." These considerations led to the passing of

Geo. II. c. 19. By this Act, all horses were to be entered by their real names, and no person was to start more than one for the same plate, under pain of forfeiting the horse. No plate was to be run for under the value of £50; any person starting a horse for a plate of smaller value was to forfeit £200, and any person advertising such a race was subject to a penalty of £100; arbitrary standards of weights for age were fixed, and every race was to be begun and ended on the same day; second horse was entitled to his entrance money. There was a distinction between a "match" and a "race;" for while a race, if for £50 or upwards, could be run anywhere, matches were required to be run either at Newmarket or Black Hambleton.

18 Geo. II. c. 34, was passed in order, among other things, "to restrain and prevent the excessive increase of horse-races." Under this Act it was made lawful for any person to run any match, or to start and run for a plate worth £50 or upwards, at any weights and at any place, without being liable to the penalties of 13 Geo. II. The stake could be made up by each party putting up £25 a side. (*Bidemead* v. *Gale*, 4 Burr. 2432.)

For nearly one hundred years no statutes affecting horse-racing were passed in England.

5 & 6 Wm. IV. c. 4, repealed portions of the statutes of Anne and Charles, but did not affect the statutes of Geo. II.

3 & 4 Vict. c. 5 (1839), repealed so much of 13 Geo. II. as related to horse-racing. Before this Act it was decided that steeple-chases were legal (*Evans* v. *Pratt*, 1 Dowl. N. S. 505), and also trotting matches along a road (*Challand* v. *Bray*, 1 Dowl. N. S. 788; 3 M. & G. 18). "It has been termed the new charter of horse-racing" (*Evans* v. *Pratt*, *supra*). Some time after its passing the celebrated case of *Applegarth* v. *Colley*, 10 M. & W. 728, was decided. This case was cited in argument as being in the plaintiff's favour, but it is not an authority here, being founded upon 3 & 4 Vict. c. 5, which is clearly not in force in Ontario.

Soon after this decision, and in consequence of it, very many *qui tam* actions were brought by common informers against a large number of sporting men in England for the penalties under the statutes of Charles and Anne, and 7 & 8 Vict. c. 3, afterwards extended by 7 & 8 Vict. c. 58, was enacted, which had the effect of stopping all these proceedings. It further provided that no common informer, but only the actual loser, or his representatives, could commence any proceedings for the penalties under the former statutes.

Then came 8 & 9 Vict. c. 109, which, as it were, consolidates and amends all former statutes relating to wagers and games, so that, in England, there are now no longer any restrictions with regard to racing; and transactions of this description are governed by the same laws as all other contracts: but this Act is not in force or been enacted in Ontario.

The only other English Act is 42 & 43 Vict. c. 18, by which it was declared that horse-racing within ten miles from Charing Cross in London should be unlawful, unless licensed, as therein provided.

There are no statutes of Canada or Ontario bearing upon the subject; except, in Ontario, the Agricultural and Arts Act, R. S. O. c. 39, s. 86, prohibits the carrying on of horse-racing during the days of any exhibition by any Association or Society formed under the Act, or within five miles of holding the same. Section 87 imposes a penalty of $50 or thirty days' imprisonment upon any persons guilty of a violation of this section.

This Act is openly and flagrantly violated. The object thereof and that of the old statutes is defeated; and I take it that any device such as calling these contests "Speeding in the Ring," or any other name, would be regarded by the courts as an evasive subterfuge.

There is also the Statute of Canada (R. S. O. 159), imposing penalties upon various classes of people engaged in betting, wagering, pool-selling, etc., but specially excepting stake-holders in any legal horse-race.

There are not many cases in our own courts in which the subject is discussed or considered.

The first of these is *Sheldon* v. *Law*, 3 O. S. 85. A bet B £75 to £50 upon a horse-race, and deposited the money in the hands of C, as stakeholder. They did not own either of the horses which were to run, and this bet was the only sum up on the event. A, having lost, gave C notice not to pay over the money to B, but C did so. *Held*, that A could recover the deposit from C, because the wager was illegal as contrary to 13 Geo. II. c. 19. ROBINSON, C.J., in the course of his judgment, says: "I can see no pretence for contending that the statutes referred to (Anne and the two statutes of Geo. II.) are not in force here." This case was decided in 1833.

Cronyn v. *Widder*, 10 U. C. Q. B.; 12 Geo. II. c. 28 (the Lotteries Act), has been assumed to be in force in Upper Canada by reason of our adoption of the Criminal Law of England, as it stood in 1792. The statute 13 Geo. II. c. 19, against horse-racing has, in like manner, been held to be in force in Upper Canada, and has, in several cases, been acted upon. We are bound to hold 12 Geo. II. c. 28, to be in force; first, because it comes within our adoption of the Criminal Law of England, and next, because this statute, and other statutes of a like nature, and resting on the same footing, have been treated in our courts as being in force" (per ROBINSON, C.J., pp. 360, 361). "The provisions of that statute are considered in force, although they may have been frequently disregarded or evaded" (per MCLEAN s. c. 365).

Corby v. *McDaniels*, 16 U. C. Q. B. 356, and *Marshall* v. *Platt*, 3 U. C. P. p. 13, are to the same effect.

Fulton v. *James*, 5 U. C. C. P. P. 182, decided that a trotting match for £50 between two horses driven in harness, is a legal horse-race within the statutes 13 Geo. II. c. 19, and 18 Geo. II. c. 34. The court, having held in this case that the race was legal because the horses

were entered by the owners, and the stakes were equal to £50, it seems to me logically inevitable that, having recognized what was made legal by these statutes, it follows the court must be bound to take cognizance of what was declared illegal in the same statutes.

Anderson v. *Galbraith*, 16 U. C. Q. B. 57, follows *Sheldon* v. *Law*, quoted above. The bet was declared illegal, because neither of the parties owned the horses, and they were not running for any other stakes, and the stakehold was held liable for paying over after he had been notified not to pay them over.

Hastelow v. *Jackson*, 8 B. & C. 221, is cited by ROBINSON, C.J., as supporting this latter dictum. See also to the same effect *Varney* v. *Hickman*, 5 C. B. 281.

Wilson v. *Cutten*, 7 U. C. P., is valuable as showing that the court will consider the Rules of Horse-racing when necessary for a decision. Here the race being for £50, and the horses run by the owners, it was adjudged by the court to be a legal race.

Gorham v. *Boulton*, 6 O. S. 321: in this case it was held that the decision of the race judges was final, and could not be reviewed by the court. ROBINSON, C.J., characterized the action as being an "attempt to make a court and jury judges over this horse-race instead of the stewards."

Battersby v. *Odell*, 23 U. C. R. 452, decided that the race in question was illegal under 13 Geo. II. c. 19.

Davis v. *Hewitt*, 9 O. R. 435, is a decision of BOYD, C., following *Battersby* v. *Odell*, saying "that this is an illegal contract under 13 Geo. II. c. 19 (because one of the participants was not the owner of the horse he bet upon), is not open to argument."

After careful consideration of all the authorities, I have come to the following conclusions:

1. The law in England in relation to horse-racing, as it stood in 1792, is in force in Canada, and any English statutes passed since that date are not in force here. The Riot Act, passed to prevent the disorderly assembling in the streets of London of supporters of the Pretender, is undoubtedly in force here, as also the Statute of Mortmain. Both these statutes were passed in this reign.

2. The race in question herein is an illegal race, not being for a stake or purse of £50. It was argued that there was such a stake, being $200 divided into three purses, but the statutes say that stake is for the "winning horse," the second only saving his entry.

3. In such case the plaintiff cannot bring action for a portion of a stake to which he has alleged he is entitled. He ran his chance of winning first, or some place, and cannot now fairly complain. His only remedy would have been to recover back his entrance money, provided he had demanded it from the proper custodian before the purse was paid over. This he did not do, nor does he ask it in his particulars of claim.

4. The courts will only aid the parties to a legal race when the judges appointed have failed to give a decision, or where they did not comply with, or made variations from, the rules supplied for their government. Here the judges made no decision. Assuming, for argument, that the race in question was legal, the plaintiff could have, notwithstanding this fact, followed up the protest, and brought the matter before the tribunal appointed for such purposes, and obtained their decision, which would have been binding. He did nothing in support of his protest, and let the three weeks go by, within which time he had to make it; and for this reason alone, if no other, I think he is out of court.

As to whether the condition as set out in the advertisement or that in the posters should govern, it seems to me that in all reason the former should have the preference. It was meant to reach the knowledge of horse owners near and far. They were the parties most interested in the race in question. The posters were intended for the general public, and would not reach as many readers as the advertisement published in a largely-circulated journal of sporting news. In this case, however, it does not signify, because the plaintiff had distinct notice that the race was to be run under the conditions by which Winch's horse was eligible.

The defendants, Adams and Christie, are entitled to their costs, if any. I dismiss this action, but I give no other costs against the plaintiff, as the blunder of the other defendant was the cause of the action.

The following English cases may be referred to: *Parr* v. *Wintringham*, 28 L. J. Q. B.; *Brown* v. *Overburry*, 11 Ex. 715; *Davis* v. *Wolf*, 2 L. R. 280; *Smith* v. *Littlefield*, 15 D. & R.

69; *Weekly Reports*, 10 C. L. 248; *Weller* v. *Deakins*, 2 C. & P. 618; *Greville* v. *Chaplin*, 5 Q. B. 745; *Challand* v. *Bray*, 1 Dowl. N. S. 783; *Marryatt* v. *Broderick*, 2 M. & W. 369; *Daintree* v. *Hutchinson*, 10 M. & W. 89; *Charleton* v. *Hill*, 5 C. & P. 147; *Benbow* v. *Jones*, 14 M. & W. 193; *Carr* v. *Martinson*, 1 El. & Ec. 456; *Batty* v. *Mariott*, 5 C. B. 818; *Diggle* v. *Higgs*, 2 Ex. D. 422; *Hampden* v. *Dalsh*, 19 Q. B. D. 189; *Houson* v. *Hancock*, 8 T. R. 575.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Armour, C.J.] [Nov. 16.

In re WELLER.

Married woman—Devise to—Restraint on alienation—R. S. O. c. 132, s. 8.

Certain lands were devised to W., with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years, and the proviso that the devise should be for her separate use, independent of her husband's control.

W. applied, under R. S. O. c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands.

Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a *femme sole*.

Earls v. *McAlpine*, 27 Gr. 164; 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Rosher* v. *Rosher*, 26 Chy. D. 801.

Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute.

R. S. Cassels, for the applicant.

Divisional Court.] [Nov. 19.

GRANT *v.* CORNOCK.

Husband and wife—Breach of promise of marriage—Statute of Limitations—Successive promises—Independent contracts—Justification of breach—Use of obscene language by the plaintiff—Mitigation of damages—General reputation.

In an action for breach of promise of marriage, the jury found that there was at first a mutual promise to marry in six months, and a subsequent mutual promise to marry on the death of the defendant's father. The jury were also asked (Q. 3), "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered, "Yes." The division of the father's estate did not take place till December, 1887.

Held, FALCONBRIDGE, J., dissenting, that the answer to the third question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was not barred by the Statute of Limitations at the time the action was brought, in 1888. The several mutual promises were all independent contracts, the promise of the one party being a consideration for the promise by the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run.

Costello v. *Hunter*, 12 O. R. 331, distinguished.

Per FALCONBRIDGE, J., that the answer of the jury to the third question did not show a new or substituted agreement, but an excuse for delay or a continuance of the original promise, and the case was therefore governed by *Costello* v. *Hunter*.

Held, also, FALCONBRIDGE, J., dissenting, that want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to show that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of dam-

ages, although general evidence of reputation may perhaps be admissible.

Wallace Nesbitt and *W. M. Douglas* for the plaintiff.

Shepley, for the defendant.

Chancery Division.

Divisional Court.] [Sept. 22.

REGINA *v.* LOGAN.

Conviction—R. S. C. c. 158, s. 6—Distress for the penalty—R. S. C. c. 178, ss. 87, 88.

A conviction under R. S. C. c. 158, s. 6, was quashed, because it provided for *distress* in default of payment of the fine.

Held, also, that as the extreme penalty for the offence was imposed, the irregularity in the conviction in the provision for distress was not cured under R. S. C. c. 178, ss. 87, 88.

Regina v. *Sparham*, 8 O. R. 580, approved of.

McMichael, Q.C., and *Osler*, Q.C., for the motion.

Shepley and *Badgerow*, contra.

Boyd, C.] [Oct 6.

MCLEOD *v.* AVEY.

Second mortgagee taking timber—Right of first mortgagee to make him account on security proving insufficient to satisfy his claim.

The court will not restrain a mortgagor in possession, or any one claiming under him, at the suit of a mortgagee, from cutting standing timber, unless it is proved that the acts complained of are likely to render the security scanty.

The defendant F., being a second mortgagee, entered into possession of the mortgaged premises, and cut down and sold timber thereon. In an action by the first mortgagee to realize the amount due him in which the lands were sold, but did not realize enough to pay his claim, it was

Held, that a reference should be directed to ascertain the value of the timber sold by F., and that he must account therefor.

The remedy is not limited to a mere prevention of the mischief by way of injunction; if the security falls short of satisfying the first mortgagee's claim, he can pursue the other, and make him account, by way of damages, for injury done to the property.

Brown v. *Sage*, 11 Gr. 239, referred to.

C. J. Holman, for the plaintiff.

Moss, Q.C., contra.

Boyd, C.] [Oct. 16.

THE LONDON AND CANADIAN LOAN AND AGENCY CO. *v.* GRAHAM.

Acquisition and retention of land by Co.—Sale within certain time—Sale not carried out—Power to re-sell—Recital of facts in deed to subsequent purchaser.

A loan company which, by the terms of its charter, was bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them," acquired certain land from a mortgagor by quit claim deed, dated Oct. 21, 1878, in which was contained a provision against the merger of the debt in the estate acquired by agreement, dated August 23, 1882, the company sold to a purchaser, who went into possession; but, on default by the purchaser in the terms of the agreement, the company had to resume the property.

In a suit to compel the defendant, a subsequent purchaser, to carry out a purchase, who objected to the title on the ground that the company had not sold the land within five years, and that a release should be obtained from the former purchaser and registered, it was

Held, that giving the liberal construction against forfeiture, which is a principle of statutory construction in cases like this, any *bona fide* sale was enough, though it fell short of conveyance, to prevent a forfeiture—a sale not carried out through the default of the purchaser, is such a transaction as satisfied the statute—and that, as by the contract, any default left the company at liberty to determine the ageeement, and as power to re-sell is a term of any contract respecting the sale of lands, it was competent to the company to sell to the defendant.

Held, also, that no necessity existed for obtaining a release from the former purchaser, and that as a matter of conveyance, and for

the purpose of registration, it was sufficient to recite in the deed to the defendant a sale within five years, and the subsequent ending of the contract to sell for non-payment by the former purchaser.

Arnoldi, for the plaintiff.

Hewson, for the defendant.

Boyd, C.] [Nov. 23.

THE LONDON AND CANADIAN LOAN AND AGENCY CO. *v.* GRAHAM.

Title—When shown—Demand of abstract—Costs.

On the hearing on further directions of this case (reported above), it was

Held, that showing title is the manifestation on the abstract of all matters essential to a good title, and that as defendant had demanded no abstract before action, he could not complain that title was first shown thereafter, and he was ordered to pay the costs thereof.

Bridges v. *Longman*, 24 Beav. 27, cited and followed.

Arnoldi, for the plaintiffs.

Hewson, for the defendants.

Ferguson, J.] [Nov. 13.

Re MACDONALD AND THE NOXON BROTHERS MANUFACTURING CO. (Limited), AND REVISED STATUTES OF ONTARIO (1887) C. 183.

Winding-up proceedings—"Contributory"—R. S. O. (1887) *c.* 183, *s.* 5.

A paid-up shareholder in a company is such a "contributory" within the meaning of section 5 of R. S. O. (1887), c. 183, as is entitled to initiate winding-up proceedings.

Hoyles, for the Co.

W. Nesbitt, for the petitioning shareholder.

Rose, J.] [Nov. 21.

MCDONALD *v.* MCDOUGALL.

Vendors' and Purchasers' Act—R. S. O. (1887), *c.* 112, *s.* 1—*Memorial of will over twenty years old—Contents—Evidence—Life estate.*

In an action for possession of land, the plaintiff claimed under a deed from John McD., dated March 27, 1872. John McD. had been in possession for many years (more than twenty), and died Sept. 27, 1881. The defendant claimed under a deed from Jas. McD., son of John McD., who claimed title under his grandfather's will, and offered in evidence a memorial of the will, dated Dec. 10, 1832, and registered the following day, containing the following statement: "He did also bequeath and give to Jas. McD., his grandson, the (describing the land), so as not to deprive his father during his lifetime."

Held, following *Gough* v. *McBride*, 10 C. P. 166, that the memorial could be received as evidence under R. S. O. (1887), c. 112, s. 1, and was good evidence of the devise, and that the plaintiff by his conveyance only obtained a life estate, which ended when John McD. died, and he was not entitled to possession.

D. B. McLennan, Q.C., and *J. W. Liddell*, for the plaintiff.

James Leitch and *R. A. Pringle*, for the defendant.

Boyd, C.] [Nov. 22.

CHRISTIE *v.* HOWARTH *et al.*

Unpaid stock—Liability of shareholder for—Return of nulla bona against the company before suit against shareholder—R. S. C. c. 119, *s.* 55.

A shareholder in a company is not liable to an action for unpaid stock by any creditor of the company until an execution at the suit of such creditor has been returned unsatisfied in whole or in part. Until the return of *nulla bona* in whole or in part, there is no right of action.

Held, also, that notwithstanding a judge's order for the issue of the *scire facias* was granted (*ex parte*), it could not avail against the express language of the Act R. S. C. c. 119, s. 55.

The return of *nulla bona* is that act which fixes the shareholder's liability to be sued, and without that essential ingredient there is no right to resort to the court.

Delamere and *E. T. English*, for the plaintiff.

Dr. Snelling, for the defendant Howarth.

J. M. Clarke, for the defendant Mathers.

Ferguson, J.] [Nov. 28.

Re MARA.

Vendors' and Purchasers' Act—R. S. O. (1887), *c.* 112—*Memorial of assignment of mortgage endorsed on mortgage—Discharge by assignee—Recital of assignment.*

In an application under the Vendors' and Purchasers' Act, R. S. O. (1887), c. 112, in which a registered memorial of a deed poll or endorsement made on the back of a mortgage (describing the mortgage) *habendum*, "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, etc., subject to the provisos and conditions in said mortgage, which said deed poll or endorsement by way of assignment is witnessed, etc., was offered as evidence of the assignment.

Held, sufficient.

A discharge of mortgage executed by an assignee contained these words: "And that such mortgage has been assigned to me," instead of giving the particulars of the dates of and parties to the assignment, was also

Held, sufficient.

Frank Denton, for the vendor.

Coatsworth, for the purchaser.

Boyd, C.] [Nov. 28.

KLINCK *v.* THE ONTARIO INDUSTRIAL LOAN AND INVESTMENT CO. *et al.*

Mortgage—Power to distrain—Interest or rent—Distress after maturity without fixing new tenancy—Interest as damages—Rent more than six months overdue.

In the year 1881, A made a mortgage to the defendants, maturing in 1886, in which was contained a proviso under the "short form" that the mortgagees might distrain for arrears of interest, and a special provision by which A leased the lands until the maturity of the mortgage at a rental of the same amount as the interest. A mortgaged his goods to B in January, 1887. In August, 1888, the defendants distrained on these goods for rent or interest due in 1886, 1887 and 1888. In two actions for illegal distress brought by A and B respectively,

Held, on the evidence that there was no definite tenancy after the maturity of the mortgage in 1886; that the interest after maturity was recoverable, not by the terms of the contract, but as damages; that a distress could not be made, as more than six months had elapsed after the expiry of the tenancy, and the rent becoming uncertain after the maturity of the mortgage, required a new fixation, and, therefore, there was no right of distress.

Powell v. *Peck*, 15 A. R. 138, and *Bickle* v. *Beatty*, 17 U. C. R. 469, cited and followed.

George Moberly, for plaintiffs.

McCarthy, Q.C., for defendants.

Practice.

Armour, C. J.] [Nov. 22.

In re YOUNG *v.* PARKER & CO.

Prohibition—Division Court—Judgment summons—Partnership—R. S. O. c. 51, *s.* 108, *s.s.* 4, 5, 6.

After judgment obtained against the firm of P. & Co., in a Division Court, after service of summons upon M. P., who was in fact the only member of the firm, an after-judgment summons was issued and served on R. P. The Division Court judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor.

Held, on motion for prohibition, that s.s. 4, 5 and 6, of s. 108, of the Division Courts Act, R. S. O. c. 51, are applicable only to persons who are in truth partners, and prohibition was ordered.

Munster v. *Roilton*, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App. Cas. 680, referred to.

Lennox, for the motion.

A. H. Marsh, contra.

Mr. Dalton.] [Nov. 17.

IRWIN *v.* BROWN.

Counter-claim—Defence—Reply—Jurisdiction of court—Foreign defendant—Assets in jurisdiction—Set-off—Con. Rules 3, 271, 373.

A counter-claiming defendant is not a plaintiff in an action, nor is a counter-claim an action.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant but a joinder of issue.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of $200.

Held, that this reply, even if leave were obtained, was bad, because sub-sec. (*e.*), of Rule 45 O. J. A., has not been incorporated in the Consolidated Rules. See Con. Rule 271.

Semble, that set-off, not in the shape of a counter-claim by cross-action, is now abolished. See Con. Rules 3, 373.

W. M. Douglas, for the plaintiff.

Douglas Armour, for the defendant.

Law Students' Department.

EXAMINATION DATES FOR 1889.

Hilary Term commences 4th January.

Primary Examination, Tuesday, 15th January.

Graduates and Matriculants, Thursday, 17th January.

First Intermediate, Tuesday, 22nd January.

Second Intermediate, Thursday, 24th January.

Solicitor Examination, Tuesday, 29th January.

Barrister Examination, Wednesday, 30th January.

Last day for Call Notices for Easter Term, 16th February.

Last day for Primary Notices, 5th January.

Last day for filing papers and fees (final examination) 19th January.

Easter Term commences 20th May.

Primary Examination, Tuesday, 30th April.

Graduates and Matriculants, Thursday, 2nd May.

First Intermediate, Tuesday, 7th May.

Second Intermediate, Thursday, 9th May.

Solicitor Examination, Tuesday, 14th May.

Barrister Examination, Wednesday, 15th May.

Last day for Call Notices for Trinity Term, 8th June.

Last day for Primary Notices, 20th April.

Last day for filing papers and fees (final examination) 4th May.

Trinity Term commences 2nd September.

Primary Examination, Tuesday, 13th August.

Graduates and Matriculants, Thursday, 15th August.

First Intermediate, Tuesday, 20th August.

Second Intermediate, Thursday, 22nd August,

Solicitor Examination, Thursday, 27th August.

Barrister Examination, Wednesday, 28th August.

Last day for Call Notices for Michaelmas Term, 14th September.

Last day for Primary Notices, 3rd August.

Last day for filing papers and fees (final examinations) 17th August.

Michaelmas Term commences 18th November.

Primary Examination, Tuesday, 29th October.

Graduates and Matriculants, Thursday, 31st October.

First Intermediate, Tuesday, 5th November.

Second Intermediate, Thursday, 7th November.

Solicitor Examination, Tuesday, 12th November.

Barrister Examination, Wednesday, 13th November.

Last day for Call Notices for Hilary Term, 7th December.

Last day for Primary Notices, 19th October.

Last day for filing papers and fees (final examinations) 2nd November.

LAW SOCIETY EXAMINATION BEFORE TRINITY TERM, 1888.

CALL—HONOURS.

CONTRACTS—EVIDENCE—STATUTES.

1. A is insured by a valued policy on a cargo for $5,000. He recovers on another policy $5,000. The true value was $7,000, and the loss was total. How much can he recover on the valued policy? Why?

2. How do you prove an award?

3. A brings an action against B for goods sold and delivered by A to C; B was the undisclosed principal of C, with whom A dealt; it appears on the trial that B has paid C for the goods. How far is this a defence in A's action?

4. Explain the rule "a legal obligation for another's debt will be equivalent to a previous request."

5. A common carrier refuses to carry goods except on conditions which appear to the customer unfair and unreasonable. What course ought the customer to pursue, and what remedy has he?

6. A document is tendered in evidence for the purpose of defeating the Statute of Limitations; distinguish the functions of the judge and jury respecting such document, and facts connected with it.

7. What distinction is there between contracts within the Statutes of Frauds and written contracts under the common law as to variations by a new contract not in writing?

8. A claim and counter-claim are both dismissed with costs. What is the rule as to he costs of the proceedings?

9. A document is subscribed by an attesting witness. What are the rules as to calling such witness to prove the document?

10. What species of act on the part of the defendant is necessary to enable the plaintiff to maintain an action for conversion of goods, and what evidence must plaintiff adduce to prove his case?

Harris on Criminal Law.

Broom's Common Law, Books 3, 4.

Blackstone, Vol. I.

1. Explain briefly the law as to the liability of one who employs a contractor to do work in the execution of which the latter commits a tort.

2. State what is meant by the *trespasser ab initio*, and explain the *Six Carpenters' Case*.

3. Explain the difference between natural and artificial watercourses, as regards the rights of adjoining proprietors.

4. Define the crime of conspiracy; and distinguish the three classes into which the cases are divided.

5. Mention all the cases you can in which a prisoner may be convicted of a crime not charged in the indictment.

6. Define and distinguish principal in the first degree, principal in the second degree, accessory before the fact, and accessory after the fact.

7. Explain what is meant by seditious libel.

8. Distinguish manslaughter from homicide *se defendendo*.

9. Explain the meaning of misprision of felony.

10. In which House of Parliament must a bill for the granting of a subsidy originate, and what is the reason?

Equity.

1. What effect, if any, has the lunacy of a partner upon the partnership?

2. State the relative rights and liabilities existing between mortgagor and mortgagee, when the latter is in possession of the mortgaged premises.

3. A and B become sureties for C, a contractor erecting certain works, the contract provided that three-fourths of the work as finished should be paid for periodically, remainder on completion, payments were made exceeding three-fourths of the work done. What effect, if any, would this have? Explain, giving law.

4. Explain the equitable doctrine of conversion. Is there any provincial legislation which may effect the same? If so, what?

5. A enters into a sufficient agreement with B for the sale to him of a house in Toronto; he dies intestate before completing the sale. Has B any remedy? If so, what? Reasons.

6. Under what circumstances is a tenant, who is entitled to pay rent, entitled to relief by way of interpleader, where there are several persons claiming title to it? and when not? Explain.

7. Are there any circumstances under which a private individual may maintain an action to restrain a public nuisance?

8. A trader in insolvent circumstances goes to a creditor, asking an advance to enable him to carry on his business. The creditor agrees to advance him the necessary funds on being secured for the debt then owing him. Security is given. The trader fails, and makes an assignment, and the assignee seeks to have the security so given set aside as a

fraud on the other creditors. Can he succeed? Reasons.

9. Discuss the several rights of vendor and vendee in a case of contract for the sale of lands where there is a misdescription of the property to be conveyed.

10. State the law as laid down by Mr. Justice Story as to the relief granted in cases of mistake of law and fact under submission to arbitration.

REAL PROPERTY AND WILLS.

1. The Conveyancing Act enacts (1) that it shall not be necessary to use words of inheritance in a conveyance, etc.; (2) that in certain cases covenants shall be implied in a conveyance. State these circumstances, and criticise and show the objections to both enactments.

2. What is the present state of the law as to the validity or invalidity of conveyances by married women with defective certificates?

3. Where no provision is made in a will or settlement for the appointment of new trustees in the place of those retiring, dying, or refusing to act, how may they be appointed without resorting to an application to the court? How do you procure the estate to be vested in them?

4. An insured house is burned pending a contract for sale. The agreement makes no provision as to the insurance. Who is entitled to the insurance money? How does it effect the rights and liabilities of vendor and purchaser respectively?

5. Upon the death intestate of the owner of the property after 1st July, 1886, the only child being of full age sells the timber on the property to A B, who removes it. Administration is afterwards taken out by a creditor. Will an action for trespass to land lie against A B by the administrator? If not, what redress, if any, has he? Explain fully.

6. What is the law as to the use of special conditions of sale by fiduciary vendors? Explain fully.

7. What are the liabilities and duties of an auctioneer selling lands (1) with respect to the terms of sale; (2) with respect to the deposit and purchase money?

8. Since the Devolution of Estates Act, can the devisee of a mortgaged estate require the mortgagee to be paid of out of the general estate for his benefit? Explain fully.

9. In examining a title you find a discharge of mortgage in statutory form signed by one only of two executors. Would you accept it as sufficient? If not, what further information or conveyance would you require? Would it make any difference whether the mortgage was made to the testator or to the executors?

10. A devise is made to A B in tail, but if he marries, the estate is to go to C D in fee simple. Construe this devise.

Miscellaneous.

THE LATEST DECISION.—Mr. Beach was once arguing a motion before his brother-in-law, Judge Rosekrans, in which the judge said he was against him; but Beach continued arguing and cited an authority, which he pronounced the very latest. "You are mistaken, Mr. Beach," said the judge; "there is a later one the other way." "I am not aware of any such decision," said the eminent lawyer. "Oh, yes," sweetly replied the judge; "the one I made in this case ten minutes ago. Any other motions, gentlemen?"

A JUDGE presiding over one of the Paris courts was recently removed from his office for two very curious offences. It appears that, after examining a witness for several hours in his court, he invited the witness to dine with him at a neighbouring restaurant. Plying him there with wine, the judge put a number of questions to his guest, and having drawn out of him certain damaging facts, forthwith caused his arrest. His other offence was still more flagrant. He talked by telephone to a witness, pretending that he (the judge) was one of the persons accused in court, and so led the witness to betray himself and his accused friend. No wonder that he was deemed no longer fit to act as a judge.

THE tales in Lord Westbury's life are in the mouths of lawyers as household words, and the biographer does not always give the best version. Bethell said to (not of) a judge who, after hearing the argument, said he would reserve the point in order to turn it over in his mind: "May it please your lordship to turn it over in what your lordship is pleased to call your lordship's mind"—not that the judge

would turn it over in what he is pleased to call his mind. The answer to the question, "Why old Cranny always sits with the Lord's Justices?" was, "The fact is that Cranny does not like to sit alone in the dark"—not, "I take it to arise from a childish indisposition to be left alone in the dark." The story about the Great Seal is a pointless application of a play upon words exhausted by a witty predecessor of Lord Westbury, when Lord Erskine, commenting on Captain Parry's statement that in the Polar Seas he had lived on seals, said: "Very good living, too, if you keep them long enough." If Lord Campbell had not been Chancellor, Bethell might have said, "I mistook you for the Great Seal." If he said what is put into his mouth, he was not only rude, which is probable, but stupid, which is unlikely. —*Eng. Law Journal.*

THE LATE MR. JUSTICE KEATING.—Sir Henry Singer Keating, who died a short time ago full of years and honours, leaves a name which will, in the history of English law, be associated with the latter days of the Court of Common Pleas. Those days were, perhaps, more brilliant than the last days of all immediately preceding the extinguishment of this great court, although Sir Henry Keating took part in both. When, in 1875, the Court of Common Pleas was merged in the High Court of Justice, to re-issue for a brief period as the Common Pleas Division, Lord Coleridge was Chief Justice, and the justices were, Keating, Brett, Grove, Denman, Archibald and Lindley. When Sir Henry Keating joined the court in December, 1859, Sir William Erle was Chief Justice, and the justices were, Vaughan Williams, Crowder, Willes, Byles and Keating, which last took the place left vacant at the top by Lord Campbell becoming Lord Chancellor, whose successor in the Court of Queen's Bench was Sir Alexander Cockburn, translated from the chiefship of the Common Pleas. A stronger court, perhaps, never sat in Westminster Hall. Every judge of it represented the best traditions of the English bench, and it was specially famed for its knowledge of commercial law. It was a court of men saturated with the learning of the law of England, but a business-like court withal, and not wanting in breadth of view.

If any two contemporaries on the bench of Common Pleas became more closely associated than the others, they were Keating and Willes. Both were born in Ireland, of English extraction, and educated at Trinity College, Dublin. Keating was ten years older than Willes, but was still a laborious junior on the Oxford Circuit, and attending the Oxford and Gloucester Sessions, when Willes was called to the bar. The first meeting took place on a winter's morning in the Temple Gardens. Keating had risen early for his studies, and, to clear his brain, was taking a brisk walk beside the river, when he met Willes on the same errand. Similarity of tastes led to a close friendship, and a few years afterwards Willes was associated with Keating as editor of "Smith's Leading Cases." In 1849 Keating took silk, leaving Willes to plod on as a stuff gown until he was made a judge in 1855, on the same bench to which Keating was added four years later. Meanwhile Keating diverged into politics. He entered Parliament as the representative of Reading in 1852, supported Lord Palmerston, and was Solicitor-General twice. He did not forget the law, but, as a private member, introduced an Act of Parliament which goes by the name of "Keating's Act." Its object was to provide a summary remedy in actions brought on negotiable instruments, which were too commonly defended merely for the purposes of delay. The principle has since been further applied, and the late judge may be considered as the inventor of that very effective and comprehensive legal weapon which goes by the name of "Order XIV." His own Act has never, we believe, been repealed, but only replaced, and has the solitary distinction of a special rule for that purpose among the rules of court. Since his retirement from active service on the bench, Sir Henry Keating has taken part in the judgments of the Judicial Committee of the Privy Council. He was never so great a lawyer as Mr. Justice Willes, but his judgments were always brief and to the point, and his judicial manner perfect. Unlike his colleague, Mr. Justice Vaughan Williams, he seldom differed from Chief Justice Erle, who, in summing up the qualities of the three judges, who usually sat with him, estimated Willes as a man of profound learning, Vaughan Williams as rather obstinate, and Keating as of singular sense.—*Eng. Law Journal.*

Appointments to Office.

DIVISION COURT CLERKS.

Prince Edward.

Francis McManus, of Picton, Clerk of the First Division Court, County of Prince Edward, *vice* Walter Ross, deceased.

Middlesex.

William C. Harris, of Delaware, Clerk of the Fourth Division Court of the County of Middlesex, *vice* Chas. G. Anderson, deceased.

BAILIFF.

Middlesex.

John A. McAlpin, of Mosa, Bailiff of the Fifth Division Court of the County of Middlesex, *vice* James A. Watterworth, resigned.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	$1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889 and 1890.

Students-at-Law.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which specia stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.

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The Canada Law Journal.

VOL. XXIV. DECEMBER 31, 1888. NO. 20.

WE delay the issue of this number that we may be able to give our subscribers the Index and Table of Cases for the current year. The Sheet Almanac will be issued with our next number, which will appear on the 16th January next.

WE are compelled by the pressure of other matter to hold over until our next issue a very interesting article by R. Vashon Rogers entitled, "Law for Ladies." His pen gives sound law in a most readable form.

OUR publishers have made arrangements by which the CANADA LAW JOURNAL and the *American Law Register* will be supplied to our subscribers at the low rate of $9 per year. We hope that a large number will avail themselves of this liberal offer.

THE Maritime Court has hitherto done its work without much assistance in the way of rules. It has been found desirable, however, to add to the few in existence and recast the whole of them. The task devolves upon His Honour Judge Macdougall, Judge of the Maritime Court. The work is in able hands and will be well done.

AT a meeting of the Supreme Court of Judicature, on the 15th inst., at which were present the Chancellor, Sir Thomas Galt, C.J., Maclennan, J.A., and Proudfoot, Rose, Robertson, MacMahon and Street, JJ., it was resolved that Rule 671 be, and the same is hereby rescinded, and the following substituted therefor, viz.: "Actions not tried or disposed of after being once entered for trial shall remain for trial subject to the provisions of Rule 670, but shall not be heard at any subsequent sittings unless and until a fresh notice of trial be given for such sittings by one of the parties."

WE are pleased to be able to announce that the Law Faculty of the Provincial University is now fully organized. The University, the public, and the profession are to be congratulated on the appointments made. The staff consists of two paid professors and nine honorary lecturers, who give their valuable time gratuitously. The Professors are Hon. Justice Proudfoot, lecturer on Roman Law; and Hon. David Mills, LL.B., lecturer on Constitutional and International Law. The Honorary Lecturers and their subjects are:—Hon. Justice MacMahon, Wrongs and their Remedies; Hon. Edward Blake, Q.C., Constitutional Law; Hon. S. H. Blake, Q.C., Ethics of Law; Mr. Dalton

McCarthy, Q.C., Civil Rights; Mr. W. R. Meredith, LL.B., Q.C., Municipal Institutions; Mr. B. B. Osler, Q.C., Criminal Jurisprudence; Mr. Z. A. Lash, Q.C., Commercial and Maritime Law; Mr. Chas. Moss, Q.C., Equity Jurisprudence; Mr. J. J. Maclaren, LL.D., Q.C., The Comparative Jurisprudence of Ontario and Quebec. Mr. Justice Proudfoot's department is in the fourth year, but as there are no fourth year students yet, his lectures will not be delivered until next year. The Hon. David Mills commenced his lectures on the 17th instant, and will continue after the new year. The Honorary Lecturers will begin work with the new year according to the calendar which has just been prepared. Mr. Justice MacMahon, on account of his recent appointment, and Mr. Meredith, on account of other engagements, desire to defer their lectures till next year. The appointments are limited to five years, so that such changes can be made without inconvenience, either by omission or addition, as may be considered necessary.

THE TORRENS ACT IN MANITOBA.

From a paragraph which recently appeared in some of the Toronto daily papers we learn that the Torrens system of registration of titles is proving a great success in Manitoba. The Act is fortunately being administered by a gentleman who appears to be fully in sympathy with its provisions, and enthusiastic in his efforts to make it efficient. A recent decision of the learned Chief Justice of Manitoba, however, seems to us likely to have a somewhat retrograde effect. *In re Lewis*, 5 Man. R. 44, the question came up for decision, whether the provision of the Real Property Act, 1885, which provides for the devolution of real estate upon the personal representative of a deceased owner extends to all lands in the province, or only to lands registered under the Act. The learned chief justice came to the conclusion that the provision in question only applies to registered lands, and that as regards lands not registered, the old law of descent prevails. The inconvenience of having two different systems of succession to real property in force in the same province would, one would have thought, have weighed with the court as a very strong reason against arriving at this conclusion; but there is not only the argument of inconvenience which may be urged against the learned chief justice's conclusion, but there is also the fact that his decision is apparently opposed to the policy inaugurated by the Real Property Act of 1885. The manifest policy of that Act, we take it to be, was to simplify titles and to facilitate the registration of titles to land under the Torrens system. One of the means by which this simplification of titles was to be accomplished, was, by the alteration of the law of succession, by getting rid of the heir-at-law, the fruitful source of so many of the difficulties in the title to real estate. By the operation of this new law of succession, the Act designed by a gradual and imperceptible means to simplify titles, and in this way facilitate their ultimate registration under the Act. The learned chief justice, however, by his construction of the Act, has given a very effectual setback to this policy. Under his decision the old difficulties attendant upon the common law system of descent are to accumulate, and titles, instead of gradually

getting simpler, are to go on in the old style, gradually getting more difficult of proof with each change of ownership; and thereby the possibility of their being registered will be rendered more and more difficult as time rolls on. This decision appears to have been arrived at by a somewhat artificial and technical construction of the Act, which certainly is broad enough in its terms to have warranted a more liberal construction.

The learned chief justice had not the benefit of argument of counsel, and his decision was given upon a case stated by the Registrar-General. These facts stated, showed that letters of administration of the personal estate and effects of a deceased owner were granted to a Mr. Sutherland, and under these letters he assumed to convey the equity of redemption. It occurs to us that the letters of administration in any case, to be effectual to give title to the real estate, should extend in terms to the real as well as the personal estate of the deceased. One of the questions propounded was, whether letters of administration were sufficient proof of the death and intestacy of the deceased; the learned chief justice, founding himself on the law of England, came to the conclusion that letters of administration were not sufficient proof of death and intestacy as regards the realty. But if the letters of administration are expressly granted in respect of both real and personal estate, we do not see why the letters would not be just as ample proof of death and intestacy as regards the realty as they are with regard to the personalty.

On the whole, we think it is unfortunate that so important a question should have been disposed of without argument, and, as it were, by a sort of side wind.

Notes on Exchanges and Legal Scrap Book.

"THE WEEK."—We are pleased to notice the improvement which has been made in our esteemed contemporary, *The Week*, now in the sixth year of its publication. The publishers promise that its independent attitude in politics and criticism will be rigidly maintained, and we understand that important additions to its list of contributors will give additional interest to its columns during the coming year. In its enlarged form, it is the same size as *Harper's Weekly*, and is the largest paper of its class on the continent. We commend *The Week* to our readers as an excellent example of the higher type of journalism. The price remains as formerly, $3 per annum.

THE FIRST CASE IN CHICAGO.—The following sketch from the *Chicago Legal News* is from the pen of Dr. Caton, ex-Chief Justice of the Supreme Court of Illinois.

Perhaps ten days after Spring and myself had introduced ourselves to the little public of Chicago, I obtained a client. Ready to earn a little outside the profession, both Spring and myself had undertaken to carry the chain for Josh. Hathaway, who had come to Chicago with me, and had been given a small job of surveying by Geo. W. Snow, who was Deputy County Surveyor.

Josh. had studied surveying theoretically, but had never set a compass, while I had some practical knowledge of the subject, so it was agreed that he should hold himself out as a surveyor, without advising the public of his want of practice, and that when he got a job I would go along to carry the hind end of the chain, and quietly give him any instructions he might need in starting. Spring was glad to go along to carry the fore end of the chain, for he seemed to be as glad to earn a dollar as I was. We found our starting point perhaps a mile north of the town, east of the north branch in the timber, and ran north. At noon we came back to town for our dinners, and as we passed the clerk's office on our way, Col. Hamilton came out and told us of a man who wanted to bring an action in attachment. We both wanted the case, of course, but agreed that we would eat our dinners and return to our work, and the Colonel was to send the client after us, and we would trust to luck as to which he would come upon first, who, of course would get the case. We told the Colonel that we would be found in that alder swamp, to which he was to direct the client. I thought that my position at the hind end of the chain would give me the advantage, for the man would most likely strike our trail where we entered the swamp, and so must necessarily follow it up, and come upon me first. We went back to our work, but made very slow progress in the dense thicket, all being idle most of the time except the axe-men. So soon as they had cleared the way sufficiently to let us advance we did so, and then sat down to wait. While thus sitting on a log, I heard a crashing in the brush, and guessed instantly that it was the coveted client. He was fighting his way slowly through the thicket, but making directly for the choppers. I thought the game was lost, but when he got opposite me, not more than twenty feet away, the devil took control of my hands, and I lifted the handful of steel pins in my right hand and dropped them into my left, which made a pretty loud ringing noise. Instantly the noise in the brush stopped, as if the traveller was in the attitude of listening. The sight could not penetrate more than half the distance between us, and the blows with the axes still continued. This, I apprehended, must soon start the man on his way to them, so I gave the stakes another ringing clash into my left hand, when the man started directly toward me, and asked me if I was a lawyer. I felt guilty of having broken the spirit of our agreement, if not the letter, and regretted what I had done ; but it was then too late to repair the wrong. I said yes, and we started for the clerk's office together, and on the way he stated his case to me. A man owed him some money, who was a non-resident, but had some property which he wished to attach. We went to the clerk's office, where I prepared the necessary papers, and procured the writ of attachment, which was duly served by the time the surveying party returned. Spring was employed the next day by John Bates to interplead.

In May, 1834, the case was tried before the first petit jury ever impanelled in the Cook Circuit Court, when Spring beat me and got the verdict. I got my judgment by default against the debtor, but could never find a thing out of which I could collect it, and, as my own client never showed up again, I got nothing except a small retaining fee, while Spring got a good fee and a good client ; so the laugh was on his side at the end, which I think he enjoyed almost as much as he did the fee.

DIARY FOR DECEMBER.

1. Sun.....*1st Sunday in Advent.*
4. Tues ...General Sessions and C.C. sittings for trials in York.
6. Thur....Chancery Division H.C.J. sits.
8. Sat.....Sir W. Campbell, 6th C.J. of Q.B., 1825. L. S. Michaelmas term and H.C.J. sittings end.
9. Sun.....*2nd Sunday in Advent.*
11. Tues....General Sessions and Co. Ct. sittings for trials, except in York.
16. Sun.....*3rd Sunday in Advent.*
21. Fri.....Shortest day St. Thomas.
23. Sun.....*4th Sunday in Advent.*
24. Mon....Christmas vacation begins.
25. Tues ...Christmas day. Sir M. Hale died, 1676, æt. 67.
26. Wed....St. Stephen.
27. Thur....J. F. Spragge, 3rd Chan., 1869.
30. Sun.....*1st Sunday after Christmas.* Holt, C.J., born, 1642.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

Re OSTRAM AND THE CORPORATION OF THE TOWNSHIP OF SYDNEY.

Municipal Act, R. S. O. c. 184, *s.* 546—*Notice of by-law to open road—Computation of time—Quashing by-law.*

The Municipal Act, s. 584, enacts that no council shall pass a by-law for establishing a public highway until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, etc.

The defendants on the 29th of July, 1887, published notices of their intention to pass a by-law on the 29th of August, 1887, to open a road across nine lots on the first concession of the township. On that day the council met and passed a by-law establishing a road across only four of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on showing cause to the motion to quash the by-law.

Nothing had been done under the by-law.

Held, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last day, and, therefore, that a notice on the 29th of July of an intention to pass a by-law on the 29th of August, was insufficient.

Authorities as to computation of time in such a case considered.

Laplante v. *Peterborough*, 5 O. R. 634; *Wannamaker* v. *Green*, 10 O. R. 547, approved of.

Quære, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice.

Baker v. *Saltfleet*, 31 U. C. R. 386, referred to.

Judgment of the court below reversed.

STUART *v.* GROUGH *et. al.*

Attachment of debts—Equitable debt—Payment by garnishee to attaching creditor after appointment of receiver—Receiver.

The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under rule 370 (Consol. Rule 935) relating to the attachment of debts. It is only a debt legally or equitably due, or accruing due, that is to say, *debitum in præsente solvendum in futuro*, which is capable of attachment; moneys which may or may not become payable by a trustee to his *cestui que* trust are not debts.

The case of *Leeming* v. *Woon*, 7 A. R. 42, is not to be followed, being founded on *Re Cowan's Estate*, 18 Chy. D. 638, which is now overruled by *Webb* v. *Stenton*, 11 Q. B. D. 530.

Judgment of FERGUSON, J., reversed.

The proper course in a case like this is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of *fi. fa.* against goods or lands.

After an order to pay over had been made upon the garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this, the garnishees subsequently, without further compulsion or threat of execution, paid the money to the attaching creditor without moving

against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so :

Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over, and the garnishees from disposing of the money when received by them (otherwise than by paying it to the receiver) without leave of the court.

The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor, to enforce the order to pay over pointed out.

Wood v. *Dunn*, L. R. Q. B. D. 72, considered.

The effect of the appointment of a receiver upon the rights of an attaching creditor considered.

Hawkins v. *Gathercole*, 1 Drew. 12 ; *Ames* v. *Birkenhead Dock Co.*, 20 Beav. 332, acted on.

WARNOCK *v.* KLŒPFER.

Insolvent debtor—Assignment of book-debts—48 Vict. c. 26, s. 2 (O.).

Held, affirming the judgment of the Chy. D. 14, O. R. 288, that book-debts are a species of property covered by s. 2 of 48 Vict. c. 26 (O.), and that any gift, conveyance, assignment, transfer or delivery thereof by a debtor in insolvent circumstances is void.

Burton, J. A., dissenting.

THE PUBLIC SCHOOL TRUSTEES OF SECTION NO. 9, NOTTAWASAGA *v.* THE CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA.

Division Courts Act, R. S. O. (1887), *c.* 51, *ss.* 77, 78—*Splitting cause of action—Abandoning excess—Res judicata—Public School Acts*, 43 *Vict. c.* 32, *s.* 4 ; 48 *Vict. c.* 49, *s.* 126 ; *R. S. O.* 1887, *c.* 225, *s.* 117—*Right of trustees to whole proceeds of rates levied for school purposes—Money had and received.*

In each of the years 1881 to 1886 inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith, as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, contending that they were entitled to retain and apply it toward payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under s. 365 of the Municipal Act.

Held, affirming the judgment of the County Court, that this section did not apply, and that the money having been collected for school purposes, the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools Act of 1885, 48 Vict. c. 46 ; R. S. O. 1887, c. 125, to alter the law in this respect.

The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon.

In 1887 the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was *res judicata* by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover, because by suing in the Division Court for the surplus of 1881 alone, they had divided their cause of action into two or more suits, contrary to s. 77 of the Division Courts Act, R. S. O. 1887, c. 51.

Held, reversing the judgment of the County Court, (1) That the recovery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under s. 77, or after abandonment of the excess under Rule No. 7, was no defence to an action for the surplus rates received by the defendants in the subsequent years ; (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence.

or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action.

Semble, that the several claims being entirely distinct and unconnected, did not form "cause of one action," so as to come within the prohibition of s. 77 against dividing a cause of action.

Re Ackroyd, 1 Ex. 479, referred to.

The proper form of judgment in the Division Court when the excess is abandoned, or the action is for balance of an account, pointed out.

REDDICK *v.* SAUGEEN.

Fire insurance—Statutory conditions—Additional conditions—Title—Physical risk—Moral risk.

The defendants in the prescribed manner endorsed upon the plaintiff's policy, as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution, or any incumbrance on the property or on the land on which it was situate, should avoid the policy, unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated, was incumbered by a mortgage for $1,500, but omitted to disclose that it was also charged, together with other property, with a small life annuity in favour of his father. The omission was not explained, but it was not attributed to any fraudulent intent.

The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition on the above addition thereto.

The jury found that the existence of the annuity was not material to be made known to the defendants.

Held, affirming the judgment of the Q. B. D., (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one, because it was not limited to such facts or matters as were material to be made known to the company. (3) That the Divisional Court might determine whether the condition was a just and reasonable one, and that it was not necessary that it first should have been raised at the trial.

In the statutory declaration proving the claim under the policy, the plaintiff said nothing of the annuity in favour of his father. Defendants failed to prove, and the jury were not asked to find, that the declaration was fraudulently false in this respect:

Held, no defence under the 15th statutory condition. *Mason* v. *Andes*, 18 C. P. 19, followed.

Semble, the first statutory condition applies to matters of title or incumbrance, or concerning the "moral" as well as the "physical" risk, where the policy is based upon an application on which the insured is interrogated as to such matters.

Klein v. *The Union Ins. Fire Co.*, 3 O. R. 234, approved and distinguished.

On the argument of the appeal, the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling-house, thereby contracting with the defendants that it was so occupied; whereas, in fact, it was then vacant; and that there being thus an entire misdescription of the subject matter of the insurance, the risk never attached. On the pleadings and at the trial this misdescription was relied upon, merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and that the application for the substituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked, and had told him that the building was then unoccupied.

Held, that under the circumstances the knowledge of their general manager was the knowledge of the company; that the misdescription was immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground and set it up as a covenant.

EMBURY *v.* WEST.

Chattel mortgage to secure indorser—Relation back to prior agreement—Renewal.

A chattel mortgage to indemnify an endorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability.

The requirements of section 6 of the Chattel Mortgage Act, as to setting forth an agreement in the mortgage, apply only to mortgages to secure future advances for the purposes therein mentioned.

In the case of a mortgage under that section as security against liabilities incurred by indorsing, or in any other way, all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mortgage, and shall be sufficiently described or identified therein.

The head note in *Barker* v. *McPherson*, 13 A. R. 356, corrected.

The reference in such a mortgage to a possible future renewal or extension of the liability which has not been agreed for, and which the mortgagee is not bound to accede to, does not invalidate the mortgage if in other respects sufficient.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Nov. 19.

FINCH *v.* GILRAY.

Landlord and tenant—Payment of taxes by tenant—Rent—Real Property Limitation Act.

Where there is no contract between landlord and tenant as to payment of taxes on the demised premises the landlord must pay them; and, therefore, payment of the taxes by the tenant must be regarded as part of the compensation which the landlord receives for the use of the land.

And where the tenant agreed to pay the taxes, and six dollars monthly in addition, and did pay the taxes during the whole period of his possession, but did not pay anything else from Christmas, 1867, until March, 1886.

Held, that the payment of taxes was equivalent to payment of part of the rent, and prevented the running of the statutory period of limitation prescribed by the Real Property Limitation Act.

Per STREET, J., dissenting, that the collector could not be treated as the agent of the landlord, and the payment of taxes was not sufficient to take the case out of the statute.

Wallace Nesbitt, for the plaintiff.

J. B. Clarke, for the defendant.

Chancery Division.

Boyd, C.] [Nov. 28.

BUTLAND *v.* GILLESPIE *et al.*

Mortmain Act—Toronto General Hospital—16 Vict. c. 220—Devise of land.

The Act 16 Vict. c. 220, incorporating the Toronto General Hospital, provides that it shall and may be capable of receiving and taking from any person . . . by grant, devise, or otherwise, any lands, or interest in lands, . . . which any such person may be desirous of granting or conveying for the support and use of the hospital.

Held, that the plain meaning of this provision was to capacitate any person to devise land to the hospital, and to qualify the hospital to receive and enjoy beneficially lands so devised, notwithstanding the Mortmain Act, and a devise of lands to the hospital held valid.

Blake, Q.C., and *Creelman*, for the plaintiff.

Moss, Q.C., and *Barwick*, for the defendants.

Boyd, C.] [Nov. 28.

TOTTEN *v.* TRUAX.

Tax sale—Indian lands—R. S. C. c. 43, s. 77.

Held, that R. S. C. c. 43, s. 77, s.s. 3, exempting Indian lands from taxation, only so exempts such lands while the title and interest is wholly in the Crown, but if the Crown sells or locates, then the interest of the purchaser

or locatee is subject to taxation by the local government.

Recent legislation at Ottawa is in recognition of the right thus to sell the interest of holders of Indian lands while yet unpatented, such sales being subject to the recognition of them by the Superintendent-General of Indian Affairs, 51 Vict. c. 22.

Held, also, the reeve of the municipality was not disqualified from purchasing at a sale for taxes. He had no power or duties with reference to the taxes or to the sale of a personal or official nature, and no interference in fact was proved.

Masson, Q.C., for the plaintiff.

O'Connor, for the defendant.

Practice.

Ferguson, J.] [Nov. 17.

ARCHER *v.* SEVERN.

Costs out of estate—Interest upon from taxation.

Costs of all parties of an action for the construction of a will were ordered to be paid out of the estate of the testator, and were taxed in 1883, but there were no funds available for their payment until 1888.

Held, that interest upon these costs could not be allowed out of the estate.

H. Cassels, for the executors.

Snelling, for the other parties interested.

Ferguson, J.] [Nov. 13.

In re CHAMBLISS AND CANADA LIFE ASSOCIATION COMPANY.

Administrator ad litem—Con. Rule 311.

C. joined his wife in executing a mortgage on her land to a company, covenanting for payment, and then died intestate.

The company, being about to sell the land to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration having been taken out.

Held, that it was proper to appoint an administrator *ad litem* under Con. Rule 311.

Bruce, Q.C., for the company.

No one contra.

Street, J.] [Dec. 4.

In re CHATHAM HARVESTER CO. *v.* CAMPBELL.

Arrest—Judgment debtor—Order for examination—Appointment—Failure to attend—Committal—Substituted service of summons—Writ of attachment—Notice to debtor.

An order was made by a judge of the High Court, upon the return of a *habeas corpus*, for the discharge of the defendant from custody under a writ of attachment issued by order of a County Judge in an action in a County Court.

Held, 1. That an order to examine the defendant as a judgment debtor, and an appointment under it, together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent, and the power of the examiner under it at an end; to obtain a fresh appointment a fresh order was necessary.

Jarvis v. *Jones*, 4 P. R. 341; *McGregor* v. *Small*, 5 P. R. 56, referred to.

2. If an order for substituted service of a summons or notice of motion to convict can be made at all, even under the wide language of Con. Rule 467, it should not be made, except in a case where no doubt exists that the notice will come to the knowledge of the person against whom it is directed.

3. The order asked for by the summons, viz., for the committal of the defendant to the common gaol, was the appropriate punishment authorized by R. S. O. (1877), c. 50, s. 505, for disobedience to an order to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate, a different order from that indicated in the summons should not have been made in the absence of the debtor.

4. The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by Con. Rule 879, and it made no difference that it was in lieu of one which had expired.

E. D. Armour, for plaintiff.

Aylesworth, for defendant.

STREET, J.] [Dec. 11.

In re PECK AND TOWNSHIP OF AMELIASBURGH.

By-law—Procedure on motion to quash—Notice of motion—Time.

The procedure by rule *nisi* to quash a by-law is no longer in force, and the proceeding by motion is substituted for it; but section 332 of the Municipal Act, R. S. O. c. 184, which requires four days' notice of an application to quash, is still in force; and the notice of motion given in this case, being only a two days' notice, was insufficient.

A. H. Marsh, for the applicant.

No one for the township.

Street, J.] [Dec. 11.

WILLGRESS *v.* CRAWFORD.

Foreclosure—Subsequent incumbrancer—Reference — Interlocutory order — Amending judgment.

There is no authority to make a reference by interlocutory order to a Master to add parties, with the object of allowing them to redeem or having them foreclosed.

And where the plaintiff in a mortgage action obtained the usual foreclosure judgment, and had his account taken thereby without a reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780 and 781, so as to convert it into a judgment under Con. Rule 776, with a reference to the Master in Ordinary to add incumbrancers, take the accounts, etc.

H. T. Beck, for the plaintiff.

MacMahon, J.] [Dec. 11.

REGINA *v.* REMON.

Criminal law—House of ill-fame—Inmate—Satisfactory account of herself—R. S. C. c. 157, s. 8, s.s. (j.)

Upon a charge against an inmate of a house of ill-fame under s.s. *j.*, of s. 8, of R. S. C. c. 157, it is not necessary to show that the accused was called upon to account for her presence in the house before arrest; the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates.

Regina v. *Leveque*, 30 U. C. R. 509, distinguished.

Aylesworth, for the defendant.

J. R. Cartwright, for the Crown.

Street, J.] [Dec. 11.

TRUST AND LOAN CO. *v.* GORSLINE.

Receiver by way of equitable execution—Attachment of debts—Salary not yet due.

Judgment creditors, on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money, which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a schoolmaster. The application was refused.

Held, that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all.

Kincaid v. *Kincaid*, 12 P. R. 462, distinguished.

A. H. Marsh, for the judgment creditors.

No one for the judgment debtor.

Street, J.] [Dec. 11.

In re DICKSON INFANTS.

Infants — Habeas corpus—Right of father to custody—Age of infants—Habits of parents—Religious belief—R. S. O. c. 137, s. 1.

Upon an application by the father of two infants, under the ages of five and three respectively, for a *habeas corpus* to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill-treated her that she was justified in leaving him, while she was a moral and sober woman. It was also shown that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so.

Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present.

It was urged that the father had a right to have the children brought up as Presbyterians, and that the mother and her mother were both members of the Salvation Army.

Held, that this question was not a pressing one, owing to the tender age of the infants; the father might raise it again.

Held, also, that having regard to the wide discretion given by R. S. O. c. 137, s. 1, the judge was freed from any possible obligation to make, upon the application of the father, an order which would be refused in the application of the mother.

F. E. Hodgins, for the father.

W. H. P. Clement, for the mother.

Street, J.] [Dec. 11.

BURKE *v.* PITMAN.

Indemnity — Relief against co-defendants— Procedure where such relief claimed—Trial of questions raised.

No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised.

P. borrowed money from the plaintiff, and then went into partnership with N. P. and N. afterward sold the business to B. The plaintiff, having judgment against P., brought this action against P., N. and B. to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing in the books, which the liability to the plaintiff did, and he claimed indemnity against N. and B.

Held, that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff, would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing.

George Macdonald, for the plaintiff.

George Ritchie, for the defendant P.

Gunther, for the defendants N. and B.

Rose, J.] [Dec. 14.

PATTERSON *v.* GILBERT.

Report—Confirmation—Order—Consent.

Unless by consent, a report cannot be confirmed until after the lapse of time limited by Con. Rule 848.

It is an undesirable practice for an officer to make an order confirming his own report.

W. H. Blake, for the defendant.

H. H. Robertson, for the plaintiff.

Miscellaneous.

IN NEWGATE.—A well-known member of the Chicago Bar, who visited London during the past summer, among the sights took in the famous Newgate prison, whence so many prisoners, in times past, went forth to die upon the scaffold. He expressed a wish to his English guide to go inside one of the cells and see how it looked. The Englishman said "Certainly." The Chicago lawyer had no sooner entered the cell than the Englishman quietly shut the door, locked it, and walked away. The lawyer at first thought he would be liberated in a few minutes. He lighted a cigar and commenced smoking. But when half an hour had passed, and no one came, he called aloud for help, and kicked the door as if he would kick it down, but no one heard his cries; if they did, they were not heeded. After more than an hour had passed, the keeper came and wanted to know what in the world the prisoner was kicking up such a row for. The lawyer was told that the rules of the prison were so strict that no matter how a person came to be locked up in a cell, he could only be discharged upon a ticket of leave, which could only be obtained from the prison authorities. The ticket was soon obtained. The guide then told the lawyer if he had seen enough of their English sweat-box he was entitled to his discharge, and that twelve men who had been confined in that cell had been hung for crimes against the State. The matter was finally settled to the satisfaction of all concerned by the lawyer, the keeper, and the guide, over a glass of half-and-half.—*Chicago Legal News.*

Law Society of Upper Canada.

TRINITY TERM, 1888.

The following gentlemen were called to the Bar during Trinity Term, 1888, viz. :—*September 3rd*—Robert James McLaughlin, with honours, and awarded a gold medal; William Mundell, with honours, and awarded a silver medal; William Henry Williams, Alexander James Boyd, Stuart Alexander Henderson, Clifford Kemp, John Kyles, Henry Edward Irwin, Henry Newbolt Roberts, William John McWhinney, John Barrett Davidson, Charles Albert Blanchet, Edward Herbert Johnston, John Clark, Arthur Wellington Burk, Orville Montrose Arnold, Joseph Hood Jacks, Hubert Hamilton Macrae, Arthur Arnold Mahaffy, Robert Osborne McCulloch, William Wallbridge Vickers. *September 4th*—Robert Hall Pringle. *September 8th*—Henry Blois Witton, Edward Henderson Ridley, Ralph Robb Bruce. *September 14th*—Stephen Wesley Burns.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz. :—*September 3rd*—W. H. Williams, E. W. H. Blake, C. A. Blanchet, W. W. Vickers, R. M. Dennistoun, W. A. F. Campbell, J. B. Davidson, A. MacNish, O. M. Arnold, E. H. Johnston, W. Lawson. *September 4th*—A. J. Boyd, C. Kemp, W. Mundell. *September 8th*—T. Browne, H. E. Irwin, J. Kyles, J. T. Doyle, J. L. Peters, E. H. Ridley. *September 14th*—M. Wright, A. W. Burk, S. W. Burns.

The following gentlemen passed the Second Intermediate Examination, viz. :—A. E. Lussier, with honours and first scholarship; and Messrs. G. Ross, B. N. Davis, T. W. R. McRae, F. M. Young, F. S. Mearns, A. Weir, J. McCulloch, W. A. Thrasher, C. E. Lyons, E. L. Elwood, J. W. Roswell, A. B. McCollum, R. Segsworth, J. F. Keith, G. E. K. Cross, J. B. Arnold, H. D. Cowan, W. J. Hanna.

The following gentlemen passed the First Intermediate Examination, viz. :—W. Wright, with honours and first scholarship; A. G. McKay, with honours and second scholarship; J. A. Ferguson, with honours and third scholarship; A. J. Anderson and A. G. McLean, with honours; D. O'Brien, F. Pedley, W. E. L. Hunter, A. H. Northey, W. F. Smith, A. C. Boyce, S. E. Lindsay, R. C. Gillett, W. McBrady, G. T. Kerr, A. Crozier, H. L. Puxley, D. Mackenzie, D. J. Hurteau, J. J. Drew, S. C. Macdonald, J. A. Mather, J. Armour, N. D. Mills, W. J. Kidd, H. Carpenter, W. H. Nesbitt, H. B. Travers.

The following candidates were entered on the books as Students-at-law, viz. :—*Graduates*—William Johnston, Philip Embury Ritchie, Alexander Andrew Smith, William Francis Robinson, Henry Anson Lavell, William Edward Burritt, George Francis Downes, John Graham Harkness, Franklin Arthur Hough, Newton Kent, William Alexander Lamport, William Arthur Leys, William Moore McKay, William Bernard Nichol, Edwin Arthur Pearson, Samuel Davis Schultz, William Llewellyn Wickett, Richard George Henry Perryn. *Matriculants*—Richard John Sims, Samuel Verschoyle Blake, Hugh McConaghy. *Juniors*—William McFarlane, Leopold Trefusis Wells Williams, D'Arcy Rupert Tate, Edmund Foster Burritt, John Joseph Coughlin, Archibald Young Blain, Herbert David Smith, Thomas Joseph Anderson, Morley Punshon Vandervoort, Edwin Armitage, Ede Halliwell, Frederick Moira Canniff, Henry Marshall Graydon, Nassau Brown Eagen, Columbus Calverley, Edward McMartin, Hugh Paterson Innes, John Troughton Thompson, jun., Dugald Campbell, Neil Hugh McIntosh, William Edgar Foster, Boulton Ramsay Kean, Alfred Ernest Fripp, Clarence George Powell.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with Clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with

the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem:—

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1889—Lamartine, Christophe Colomb.

1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R. S. O. 1887, cap. 44; the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be computed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

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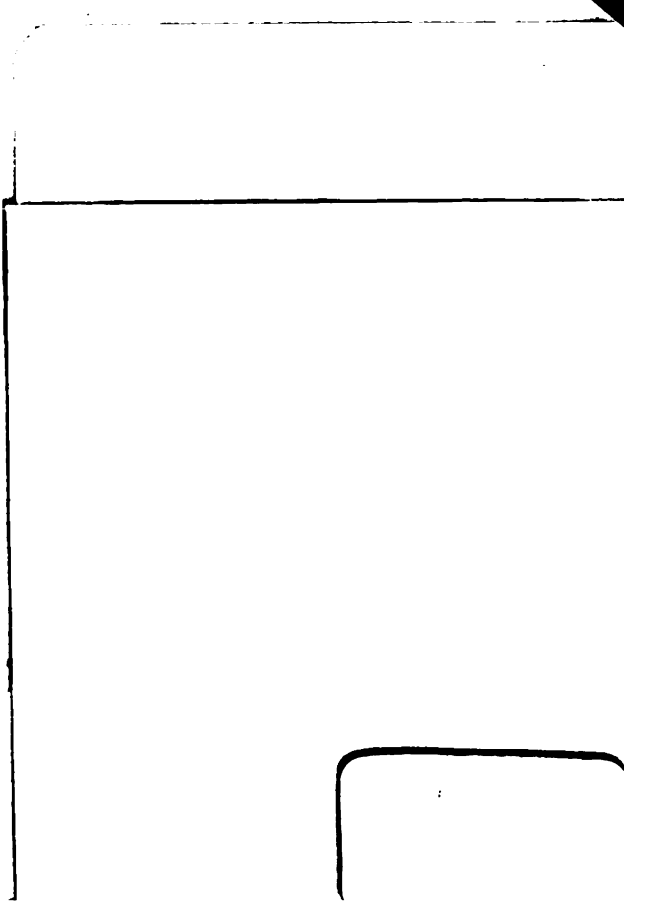
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